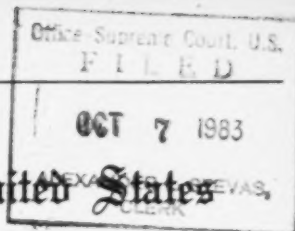


83-712
No. _____



In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-vs-

T.L.O., a Juvenile,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY**

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
(609) 292-8740

Attorney for Petitioner,
State of New Jersey

*Of Counsel &
On the Petition*
ALLAN J. NODES
VICTORIA CURTIS BRAMSON
Deputy Attorneys General
Division of Criminal Justice

QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school.

PARTIES TO THE PROCEEDING BELOW

In addition to the captioned parties, the parties in the New Jersey Supreme Court included Jeffrey Engerud, defendant now deceased, and, as *amicus curiae*, the New Jersey School Boards Association and the American Civil Liberties Union of New Jersey.

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF NEW JERSEY,

Petitioner,

vs.

T.L.O., a Juvenile,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

OPINIONS BELOW

State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd* 94 N.J. 331, 463 A.2d 934 (1983).

JURISDICTION

The judgment of the New Jersey Supreme Court which is the subject of this petition for *certiorari* was entered on August 8, 1983, and this petition has been filed within sixty (60) days of that date pursuant to *Rule 20(1)*, Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of *Title 28, United States Code, Section 1257(3)*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J.S.A. 24:21-19. Prohibited Acts

A. Manufacturing, distributing, dispensing - Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

(1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense a controlled dangerous substance;

N.J.S.A. 24:21-20. Prohibited Acts

B. Possession, use or being under influence - Penalties

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to: ...

(4) Possession of more than 25 grams of marijuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than \$15,000.00 or both; provided, however, that any person who violates this section with respect to 25 grams or less of marijuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

STATEMENT OF THE CASE

On the morning of March 7, 1980, a teacher of mathematics at Piscataway High School entered the girls' restroom and found the juvenile-respondent T.L.O. and a girl named Johnson holding what the teacher perceived to be lit cigarettes. (MT20-1 to 25).¹ Smoking was not permitted and the girls were thus committing an infraction of the school rules. The girls were taken to the principal's office where they met with Theodore Choplick, the assistant vice-principal. (MT21-1 to 3; MT21-24 to 22-11; MT31-18 to 20; MT33-20 to 34-10).

Mr. Choplick asked the two girls whether they indeed were smoking. Miss Johnson acknowledged that she had been smoking and Mr. Choplick imposed three days' attendance at a smoking clinic as punishment. (T49-24 to 50-7). T.L.O. not only denied smoking in the lavatory, but further asserted that she did not smoke at all. (MT27-10 to 17). Rather than merely hand out punishment in the face of T.L.O.'s denial, Mr. Choplick asked T.L.O. to come into a private office. (MT27-14 to 21; MT30-22 to 31-17).

Once inside this office, Mr. Choplick requested the juvenile's purse and she gave it to him. (MT27-24 to 28-7). A package of Marlboro cigarettes was visible inside the purse. (MT28-9 to 11). Mr. Choplick held up the Marlboros and said to the juvenile, "You lied to me." (MT28-14 to 18). In plain view next to the Marlboros was a package of "Easy Roll" rolling papers for cigarettes. (MT28-19 to 24; T16-12 to 14). The juvenile was confronted with the rolling papers and denied that they belonged to her. (MT29-5 to 24).

On the basis of his experience, Mr. Choplick understood possession of rolling papers to indicate that a person is smoking marijuana. (MT29-7 to 9; T15-18 to 16-1). Therefore, Mr. Choplick looked further into the purse and found other drug paraphernalia and documentation of T.L.O.'s sale of marijuana to other students. Mr. Choplick called T.L.O.'s mother and then notified the police. (MT41-5 to 13).

T.L.O.'s mother acceded to a police request to bring her daughter to police headquarters for questioning. (T18-12 to 18). Once at headquarters, T.L.O. was advised of her rights in her mother's presence and signed a *Miranda* rights card so indicating. (T20-3 to 21). The

¹ "MT" refers to the transcript of the motion to suppress evidence heard on September 26, 1980;

"T" refers to the transcript of trial on March 23, 1981, the transcript of the juvenile's plea of guilty to other complaints on June 2, 1981, and the transcript of sentencing on January 8, 1982, all contained in one volume.

officer then began to question T.L.O. in her mother's presence. (T23-4 to 6). T.L.O. admitted that the objects found in her purse belonged to her. She further admitted that she was selling marijuana in school, receiving \$1 per "joint", or rolled marijuana cigarette. T.L.O. stated that she sold between 18 to 20 joints at school that very morning, before the drug was confiscated by the assistant vice-principal. (T22-2 to 15). A delinquency complaint charging the juvenile with possession of marijuana with the intent to distribute, contrary to *N.J.S.A. 24:21-19(a)(1)* and *N.J.S.A. 24:21-20(a)(4)*, was then drafted and filed the same day. Because the offense occurred on school property, the school, in accordance with its published procedures, administratively suspended the juvenile for ten days.

On September 26, 1980, the State trial court considered and denied the juvenile's motion to suppress evidence. See *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327, 1343-1345 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part* 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). On March 23, 1981, the juvenile was tried and, at the conclusion of trial, she was found guilty and adjudicated delinquent. (T69-6 to 8). On January 8, 1982, T.L.O. was sentenced to probation for one year with the special condition that she observe a reasonable curfew, attend school regularly and successfully complete a counselling and drug therapy program.

On February 11, 1982, the juvenile filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On June 30, 1982, the Appellate Division, with one judge dissenting, affirmed the denial of the motion to suppress evidence seized in the search of the juvenile's purse, for the reasons expressed in the trial court's reported opinion. *State in the Interest of T.L.O.*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982).

On July 16, 1982, the juvenile filed a Notice of Appeal as of right to the Supreme Court of New Jersey. On August 18, 1983, the State Supreme Court held that the Fourth Amendment exclusionary rule applies to searches and seizures of students in public schools. *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983).

In that same opinion, the New Jersey Supreme Court decided the companion case of *State v. Engerud*, involving a search of a high school student's locker pursuant to information that the student was selling controlled dangerous substances in the school. Shortly after the date of the decision, the defendant Engerud was killed in a motorcycle accident, thus mooted any petition in that case.

SUMMARY OF ARGUMENT

The exclusionary rule should not be applied to a search of a student by a public school official. Because a school official is not primarily interested in whether a conviction is later obtained and conducts searches too infrequently to adapt his methods to the proper rules, application of the exclusionary rule would be an ineffective deterrent of those officials conducting unreasonable school searches. Any incremental deterrent effect of suppression in a later criminal proceeding would be far outweighed by the costs to society of suppression of probative evidence of criminality.

REASONS FOR GRANTING THE WRIT

POINT I

THE EXCLUSIONARY RULE IS INAPPLICABLE TO SEARCHES CONDUCTED BY PUBLIC SCHOOL OFFICIALS IN SCHOOLS.

In the present case,² the New Jersey Supreme Court ruled that a search of a public high school student's person or belongings by a school teacher or administrator constitutes an "official search" for Fourth Amendment purposes. Thus, the court ruled that the holdings of this Court require that any evidence seized pursuant to an unreasonable school search be excluded from evidence in any criminal or juvenile delinquency proceeding.³

This Court has never ruled that the Federal Constitution requires the exclusion of evidence seized pursuant to a school search performed solely by school officials devoid of any police involvement. Indeed, this Court has noted that its Fourth Amendment exclusionary rule mandates have related exclusively to searches conducted by police officials. Moreover, this Court has ruled that the exclusionary rule clearly does not apply to searches conducted by private persons not connected with law enforcement. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The State of New Jersey asserts that although school officials are employed by the public and may be considered as public officials for some purposes, they have no more connection with law enforcement than any other citizen. Therefore, we submit that this Court never intended the exclusionary rule to apply to criminal proceedings emanating from searches and seizures by school teachers and officials. The contrary holding of the New Jersey Supreme Court is clearly unsupported and erroneous.

2 *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983).

3 In this regard, it is noted that in this portion of its opinion the New Jersey Supreme Court ruled entirely on the basis of this Court's decisions and mandates. Thus, it is clear that this Court's jurisdiction is properly invoked. *Michigan v. Long*, _____ U.S. _____, 103 S.Ct. 3969, 3974-3975 (1983). The state court did refer to the fact that a state statute buttressed its conclusion that it was required to exclude evidence in a situation such as this. 94 N.J. at 342 n.5. The authority cited, however, refers only to the fact that the exclusionary rule applies equally to juvenile delinquency and adult criminal proceedings. The State of New Jersey did not contest this issue in the state courts and does not raise this issue in this Court. While agreeing that under New Jersey law the same types of illegally seized evidence would be excluded in both juvenile delinquency and adult criminal proceedings, we challenge the state court's finding that, on the basis of federal authority, evidence seized in a public school search is subject to the exclusionary rule as enunciated in *Mapp v. Ohio*, 367 U.S. 643 (1961).

The primary, if not the sole, justification for the exclusionary rule is the deterrence of illegal police conduct that violates Fourth Amendment rights.⁴ *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). In recent years, this Court has refused to apply the rule to situations where it would achieve little or no deterrence, and has articulated a balancing test for the rule's application.

The exclusionary rule is justified in the illegal search context only because of its expected deterrence of future police misconduct. In determining whether to apply the rule, the benefits of deterrence are to be weighed against the substantial detriment to society and the truth-finding process inherent in excluding relevant evidence of criminality. *United States v. Calandra*, 414 U.S. at 347; see *United States v. Ceccolini*, 435 U.S. 268 (1978). Evidence should be excluded only where the benefit accruing to society from the additional deterrent to unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. This Court has refused to rule "that anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman v. United States*, 394 U.S. 165, 174-175 (1969). The exclusionary rule is simply not coextensive with the Fourth Amendment. See *United States v. Havens*, 446 U.S. 620 (1980) (defendant may be impeached by evidence illegally obtained); *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (that the statute pursuant to which defendant was arrested was later declared unconstitutional did not require suppression of evidence seized incident to that arrest); *United States v. Caceres*, 440 U.S. 741 (1979) (violation of IRS regulations regarding electronic surveillance does not require suppression of tape recordings in the prosecution of a taxpayer for bribery of an IRS agent); *United States v. Janis*, 428 U.S. 433 (1976) (additional marginal deterrence provided by forbidding use in federal civil proceeding of evidence illegally seized by state officials does not outweigh cost to society of applying rule in that situation); *United States v. Peltier*, 422 U.S. 531 (1975) (no suppression remedy for good faith border search occurring prior to Supreme Court decision holding that such searches must be based on probable cause); *United States v. Calandra*, 414 U.S. 338 (1974).

⁴ The second asserted justification, that of the "imperative of judicial integrity," although mentioned (see *United States v. Peltier*, 422 U.S. 531, 536-538 (1975); and *Elkins v. United States*, 364 U.S. 206, 222 (1969)), has been substantially, if not completely, discounted in importance as a basis for suppressing probative evidence. See *Stone v. Powell*, 428 U.S. at 485.

(exclusionary rule is inapplicable to grand jury proceedings because the speculative and undoubtedly minimal advance in the deterrence of police misconduct would be achieved at the expense of substantially impeding the role of the grand jury); *Alderman v. United States*, 394 U.S. 165 (1969) (additional benefits of extending the exclusionary rule to persons aggrieved by introductions of evidence unlawfully obtained in violation of another's privacy rights does not justify "further encroachment upon the public interest"); *Walder v. United States*, 347 U.S. 62 (1954) (the exclusionary rule is inapplicable to evidence used to impeach the defendant).

In balancing the expected deterrence benefits of applying the exclusionary rule against the expected detriments, in the context of a search by a public school official, it is clear that the balance weighs heavily against excluding evidence. Indeed, it has been argued that exclusion can be an effective deterrent only if two conditions are met: (1) the searcher must have a strong interest in obtaining convictions, and (2) the searcher must conduct searches and seizures regularly in order to be familiar enough with the rules to adapt his methods to conform to them. Note, 19 *Stan. L. Rev.* 608, 614-615 (1967). Neither condition can be met in the case of a public school official. The assistant vice-principal in this case had no interest in obtaining a criminal conviction. Indeed, the object of his search was evidence of a school disciplinary infraction wholly unrelated to any criminal prosecution. The possibility of suppression in a subsequent criminal judicial proceeding, had it occurred to the assistant vice-principal, would not have deterred him from enforcing the school's rules, his primary concern.

In this regard, the incentive of school officials to search could not be lessened by the suppression of evidence at a subsequent delinquency proceeding. Substantial incentives for school officials to search are provided by the need to enforce school regulations, to safeguard students during school hours by confiscating weapons and other contraband and to maintain a drug-free learning environment. Under the circumstances of this case, the vice-principal would undoubtedly have followed the same course of conduct in his attempt to enforce the school's non-smoking regulations regardless of his consideration, or knowledge, that any "evidence" seized would not be used later in a court of law.

Further, school authorities conduct searches infrequently and even less frequently come in contact with the criminal justice system. They have little interest in obtaining convictions, and are unlikely to even learn whether a court deems a particular search valid. Thus, there

is no reasonable possibility that a school official will become familiar with the law governing searches and seizures and be able to conform his conduct accordingly. The facts of this case demonstrate this principle quite plainly. A layman considering the juvenile's ready compliance with the request to hand over her purse might well conclude that she consented to the search. Clearly though, under *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975), which requires that a person be specifically informed of his right to refuse permission to search, the consent was not valid. It is unreasonable to request principals, teachers and others not involved in law enforcement to understand, and be able to apply to myriad factual situations, complex principles of law which give lawyers and judges pause.

Thus, it can be seen that application of the exclusionary rule to this type of case would be costly and ineffective. The suppression of evidence impedes the search for truth and frustrates achievement of that goal. The cost, both to society and to the juvenile, is high. Balanced against these costs, there is little or no benefit. The primary value of the exclusionary rule, deterrence, is not present, for school officials acting in the course of their employment have little or no interest in criminal proceedings and are not likely to know whether or why evidence they have discovered has been suppressed. Thus, application of the exclusionary rule to searches by school authorities without law enforcement involvement is senseless. Indeed, it is clear beyond doubt that when this Court developed the exclusionary rule, it did not intend to regulate the conduct of school officials who deal primarily with minor school disciplinary problems and infractions of school rules. Rather, it intended the rule to deter misconduct on the part of those persons who are charged with the regular enforcement of the criminal laws.

Despite the fact that this Court has never, even inferentially, applied the exclusionary rule to searches by school officials, the issue presented in this case has divided the state courts. A decision by this Court is needed in order to end the confusion in this area.

While adopting varying rationales, many state courts have ruled that the purpose of the Fourth Amendment exclusionary rule -- "discouraging lawless police conduct"⁵ -- would not be furthered by application of the rule to school searches. Therefore, these states have permitted evidence seized by school officials to be admitted into evidence at criminal proceedings without regard to the constitutionality of the search. See *D.R.C. v. State*, 646 P.2d 252, 258 (Alas. Ct. App. 1982); *In re G.*, 11 Cal. App.3d 1193, 90 Cal. Rptr. 361

⁵ *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

(Ct. App. 1970); *In re Donaldson*, 269 Cal. App.2d 509, 75 Cal. Rptr. 220 (Ct. App. 1969); *State v. Young*, 234 Ga. 488, 216 S.E. 2d 586 (1975); *People v. Stewart*, 63 Misc.2d 601, 313 N.Y.S.2d 253 (Crim. Ct. N.Y. 1970); *State v. Wingerd*, 40 Ohio App.2d 235, 318 N.E.2d 866 (Ct. App. 1974); *Commonwealth v. Dingfelt*, 227 Pa. Super. 380, 323 A.2d 145 (Super. Ct. 1974); *Mercer v. State*, 450 S.W.2d 715 (Tex. Ct. App. 1970). See also *Keene v. Rogers*, 316 F.Supp. 217 (N.D. Me. 1970); *United States v. Coles*, 302 F.Supp. 99 (N.D. Me. 1969).

It must be noted, however, that other jurisdictions have ruled that even when acting alone, without any law enforcement involvement, public school officials are government agents for purposes of the exclusionary rule. In these jurisdictions, as in New Jersey following the State Supreme Court ruling in the present case, evidence obtained in a search conducted by school officials which does not strictly comply with the strictures of the Fourth Amendment will be suppressed at a criminal trial. See *State v. Baccino*, 282 A.2d 869 (Del. 1971); *State v. Mora*, 307 So.2d 317 (La. 1975), vacated and remanded sub nom. *Louisiana v. Mora*, 423 U.S. 809 (1976), *aff'd on remand* 330 So.2d 900 (La. 1976), cert. den. 429 U.S. 1004 (1976); *Doe v. State*, 540 P.2d 827 (N.M. 1975); *State v. Walker*, 528 P.2d 113 (Or. Ct. App. 1974). Cf. *Jones v. Latexo Indep. School Dist.*, 449 F.Supp. 223 (E.D. Tex. 1980).

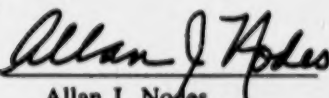
The important and recurring nature of the issue presented in this case is demonstrated by the chronology of *Louisiana v. Mora*, *supra*. In that case, the Supreme Court of Louisiana suppressed evidence obtained in a school search. This Court granted the State's petition for *certiorari* but remanded the case for consideration of whether the state judgment was based on state or federal grounds. The Supreme Court of Louisiana ruled, in a split decision, that it had ruled on the basis of both state and federal grounds, thus depriving this Court of jurisdiction. The State's reapplication for *certiorari* was denied. Although this Court was deprived of jurisdiction in *Louisiana v. Mora*, the issue presented in that case continues to reach disparate results. Compare *Jones v. Latexo Indep. School Dist.*, *supra*, and *State in the Interest of T.L.O.*, *supra*, with *Bellnier v. Lund*, 438 F.Supp. 47 (N.D.N.Y. 1977), and *D.R.C. v. State*, *supra*. Thus, this case presents an issue which has not been but should be decided by this Court. In addition, the decision of the New Jersey Supreme Court is in conflict with decisions of the courts of other states. Therefore, this Court should grant *certiorari* pursuant to *Supreme Court Rule 17(a) and (b)*.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Petitioner

By: 
Allan J. Nodes
Deputy Attorney General

Of Counsel &
On the Petition
Allan J. Nodes
Victoria Curtis Bramson
Deputy Attorneys General
Division of Criminal Justice
Appellate Section

Dated: October 7, 1983

APPENDIX

APPENDIX A

OPINION OF THE SUPREME COURT OF
NEW JERSEY DECIDED AUGUST 8, 1983

STATE IN THE INTEREST OF T.L.O.,
JUVENILE-APPELLANT.

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v.
JEFFREY ENGERUD, DEFENDANT-APPELLANT.

Argued May 10, 1983--Decided August 8, 1983.

Lois DeJulio, First Assistant Deputy Public Defender, argued the cause for appellant T.L.O. (*Joseph H. Rodriguez*, Public Defender, attorney).

Randolph A. Newman, Designated Counsel, argued the cause for appellant Jeffrey Engerud (*Joseph H. Rodriguez*, Public Defender, attorney).

Victoria Curtis Bramson, Deputy Attorney General, argued the cause for respondent State of New Jersey (*State in the Interest of T.L.O.*) (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *Victoria Curtis Bramson* and *Mark Paul Cronin*, Deputy Attorney General, of counsel and on the brief).

Rocky L. Peterson, Deputy Attorney General, argued the cause for respondent (*State v. Engerud*) (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney).

Paula A. Mullaly, General Counsel, submitted a brief on behalf of *amicus curiae* New Jersey School Boards Association (*State in the Interest of T.L.O.*) (*Paula A. Mullaly*, attorney; *Anthony P. Sciarrillo*, on the brief).

Barry S. Goodman submitted a brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (*State in the Interest of T.L.O.*) (*Crummy, Del Deo, Dolan & Purcell* attorneys).

The opinion of the Court was delivered by
O'HERN, J.

The issues here are (1) whether the Fourth Amendment exclusionary rule applies to student searches made by public school

APPENDIX A

administrators; and (2) what standard determines the reasonableness of the search if the exclusionary rule does apply.

T.L.O.

On March 7, 1980, a teacher at Piscataway High School reported that fourteen year old T.L.O. and another student were smoking in the girls' restroom. School regulations forbade smoking in that area and the teacher took the students to the assistant principal's office. He asked the students whether they had been smoking. T.L.O.'s companion admitted smoking and the assistant principal assigned her to a three-day smoking clinic.

T.L.O. denied smoking in the lavatory or indeed smoking at all. The assistant principal asked T.L.O. to go with him into a private office. He closed the door and asked her to turn over her purse. At this time they were both seated at a desk, he behind and she in front. When he opened the purse on the desk, he saw a pack of Marlboros. He picked up the cigarettes and said "You lied to me." As he reached into the purse for the cigarettes, he saw rolling papers in plain view. That fact, his experience told him, meant that marijuana was probably involved. He therefore looked further into the purse and found a metal pipe of the kind used for smoking marijuana, empty plastic bags and one plastic bag containing a tobacco-like substance. His search also revealed an index card reading "People who owe me money," followed by a list of names and amounts of \$1.50 and \$1.00, and two letters, one from T.L.O. to another student and a return letter, both containing language clearly indicating drug dealing by T.L.O. The purse also contained \$40, most of it in one-dollar bills.

The assistant principal called T.L.O.'s mother and the police. A police officer asked the mother to bring T.L.O. to police headquarters for questioning. There, T.L.O. admitted selling marijuana to other students. She was charged with delinquency based on possession of marijuana with the intent to distribute. *N.J.S.A. 2A:4-44; 24:21-20(a)(4); 24:21-19(a)(1).*¹

T.L.O. moved to suppress the evidence seized from her purse and her confession, claiming that the search tainted the confession. She also argued that she had not knowingly waived her right to remain

¹Since this drug offense occurred on school property, the school, in accordance with published procedures, administratively suspended the juvenile for ten days.

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silent. The Juvenile and Domestic Relations Court denied the motion to suppress. *178 N.J. Super. 329 (1980)*.² It found the Fourth Amendment exclusionary rule applicable to school searches, but found the standard applicable to such a search to be "a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies." *178 N.J. Super. at 341* (emphasis in original). It concluded that the assistant principal had justification for opening the purse, since he had reasonable cause to believe that smoking, a violation of school policy, had occurred. Once he had opened the purse, in the court's opinion, the contents were subject to the "plain view" doctrine. Having found the marijuana and paraphernalia, the assistant principal justifiably continued his search to determine the extent of that violation. *178 N.J. Super. at 343*.

On appeal, the Appellate Division affirmed the denial of the suppression motion on the basis of the Juvenile Court's opinion. *185 N.J. Super. 279 (1982)*. But it vacated the adjudication of delinquency and remanded for further proceedings to determine whether the juvenile had knowingly waived her constitutional rights before giving the confession. Judge Joelson dissented from that portion of the opinion that approved a standard lower than probable cause for school searches. He characterized this as "riding rough-shod over the rights of a juvenile in school." *185 N.J. Super. at 284 (Joelson J., dissenting)*. T.L.O. appealed to us of right on the basis on the dissent below. *R. 2:2-1(a)(2)*.

ENGERUD

On January 29, 1980, a vice-principal at Somerville High School met with a Somerville police detective in the high school office. The detective had just received a telephone call from a person claiming to be the father of a student. The caller said that the defendant, an eighteen year old student at the school, was selling drugs in the school and if the police did not stop it, he would take matters into his own

²During the pendency of the delinquency proceeding, the juvenile, by her parents, challenged her suspension in Superior Court, Chancery Division. That court ordered the suspension quashed because the search that revealed the marijuana violated the Fourth and Fourteenth Amendments.

The Juvenile Court considered and denied the juvenile's motion to dismiss the delinquency complaint. It refused to give *res judicata* or collateral estoppel effect to the Chancery Division's suppression of evidence in appellant's challenge to her suspension. *178 N.J. Super. 329 at 343-45*. That issue is not before us.

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hands. Their conversation lasted five minutes and the detective left the building.

The vice-principal then relayed this information to the assistant principal and the principal. The principal had heard a "rumor" a year earlier that the defendant was selling drugs at the school. He and the assistant principal opened the defendant's locker through the use of a pass-key that could open any locker in the building even though the lockers are equipped with combination locks. The two men made a complete search of the locker and its contents. In the defendant's coat pocket they found two plastic bags containing packets of a white substance that turned out to be methamphetamine (speed). Each packet was marked with its weight in fractions of a gram. They also discovered a package of marijuana rolling paper.

The vice-principal called the police and defendant's parents and took the defendant out of class. The principal asked the defendant to empty his pockets. This disclosed a small quantity of marijuana and \$45 in cash.

Engerud was charged with unlawful possession of a controlled dangerous substance and unlawful possession of a controlled dangerous substance with intent to distribute. *N.J.S.A. 24:21-20(a)(1); 24:21-19(a)(1)*. On June 18, 1981, the Law Division Judge denied a motion to suppress the evidence obtained from the locker and pocket searches. In his view the search was "responsible and diligent under all of the circumstances."

On July 9, 1981, defendant pleaded guilty to the second count of the indictment and was sentenced to an indeterminate term at Yardville, not to exceed five years. His sentence was stayed pending appeal. We certify Engerud's appeal directly. *R. 2:12-1. 93 N.J. 308 (1983)*.

I.

"It can hardly be argued that ... students ... shed their constitutional rights ... at the schoolhouse gate." *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969). In *Tinker*, the Supreme Court recognized that wearing an armband in school for the purpose of expressing certain views is a type of symbolic act that is protected by the free speech clause of the First Amendment. *Id.* at 505, 89 S.Ct. at 735, 21 L.Ed.2d at 737. It found that wearing the armband in the

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circumstances of the case involved no actually or potentially disruptive conduct, *id.*, and that students' constitutional rights are protected unless their conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *id.* at 513, 89 S.Ct. at 740, 21 L.Ed.2d at 741. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), establishes that whenever students face loss of an important substantive right, they share with every person protected by the Constitution the right to procedural due process.

This long-standing³ recognition of students' legitimate entitlement to the minimum protections of the Constitution parallels the developing concern of the Court that the juvenile justice system reflect the fundamental fairness that our Constitution guarantees adult offenders. See *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Young people and students are persons protected by the United States and New Jersey Constitutions. E.g., *Island Trees Union Free School Dist. No. 26 Bd. of Educ. v. Pico*, _____ U.S. _____, _____, 102 S.Ct. 2799, 2807, 73 L.Ed.2d 435, 445-46 (1982); *Tinker*, 393 U.S. at 511, 89 S.Ct. at 739, 21 L.Ed.2d at 740; *Gault*, 387 U.S. at 13, 87 S.Ct. at 1436, 18 L.Ed.2d at 538. But compare *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (Eighth Amendment does not bar moderate corporal punishment of students) with *N.J.S.A. 18A:6-1* (banning corporal punishment in New Jersey schools).

Some contend, however, that the exclusionary rule should not apply since the fundamental purpose of *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), is to deter law enforcement officials from violating constitutional rights. They suggest that the school official be viewed as a private person, indeed as one *in loco parentis*,⁴ whose relationship to the student does not invoke the same protections as a search by a law enforcement official. But "[t]he Four-

³In *Tinker*, Justice Fortas showed that the Court had for half a century unmistakably recognized the application of constitutional rights to students. 393 U.S. at 506, 89 S.Ct. at 736, 21 L.Ed.2d at 737 (citing, *inter alia*, *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Bartels v. Iowa*, 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047 (1923); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)).

⁴Judges and commentators have not failed to detect the irony of this analogy. They suggest that parents infrequently search their children and turn the evidence over to police for prosecution. E.g., *State in Interest of T.L.O.*, 185 N.J.Super.

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teenth Amendment [here incorporating the Fourth Amendment], as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628, 1637(1943) (school may not compel flag salute over religious objection); *State in Interest of G.C.*, 121 N.J. Super. 108, 114 (J.D.R.C. 1972). The "basic purpose of [the Fourth Amendment] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *In re Martin*, 90 N.J. 295, 312 (1982) (Pashman, J.) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305, 311 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930, 935 (1967)).

It is of little comfort to one charged in a law enforcement proceeding whether the public official who illegally obtained the evidence was a municipal inspector, *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *Camara*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930; a firefighter, *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed.2d 486, 496 (1978); or school administrator or law enforcement official. We believe that the issue is settled by the decisions of the Supreme Court and we accept the proposition that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings.⁵

279, 282 (App. Div. 1982) (Joelson, J., dissenting); *Mercer v. State*, 450 S.W.2d 715, 721 (Tex. Civ. App. 1970) (Hughes, J., dissenting); *State v. McKinnon*, 88 Wash.2d 75, 91, 558 P.2d 781, 790 (Wash. Sup. Ct. 1977) (Rosellini, J., dissenting); Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 768 (1974); Trosch, Williams & DeVore, "Public School Searches and the Fourth Amendment," 5 J.L. & Educ. 41, 53 (1982); Comment, 5 Fla. St. U.L. Rev. 526, 531 (1977). Today, cases reject broad application of the concept. E.g., *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470, 480 n. 18 (5th Cir. 1982), cert. den., _____ U.S. _____, 103 S.Ct. 3536, 76 L.Ed.2d _____ (1983); *D.R.C. v. State*, 646 P.2d 252, 255 (Alaska Ct. App. 1982).

⁵Our Code of Juvenile Justice buttresses this conclusion. It specifically provides: The right to be secure from unreasonable searches and seizures ... shall be applicable in cases arising under this act as in cases of persons charged with crime. [N.J.S.A. 2A:4-60].

Juvenile proceedings are not criminal proceedings but for ease of discussion we shall refer to suppression of evidence in criminal proceedings when a juvenile is charged with an offense under N.J.S.A. 2A:4-44 that would be a criminal offense if committed by an adult.

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II.

A more difficult question is whether a school official may effect a search without a warrant. We start with this proposition:

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." [*Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290, 298-99 (1978)(quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585 (1967))].

See also *State v. Bruzzese*, _____ N.J. _____, _____ (1983) (slip op. at 8-9); *State v. Patino*, 83 N.J. 1, 7 (1980).

Our Court has generally held that, except in certain carefully defined classes of cases, officials may not conduct administrative searches of private property without a warrant. *Martin*, 90 N.J. 295. One of the best recognized exceptions is for "pervasively regulated" businesses. *United States v. Biswell*, 406 U.S. 311, 315-16, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87, 92 (1972); *Martin*, 90 N.J. at 312; *State v. Dolce*, 178 N.J.Super. 275, 283 (App.Div. 1981). Although the school setting does not at first glance fit that general mode, "[w]ithin that matrix, we examine the statute[s] and conduct of the [school officials] in this case." See *State v. Williams*, 84 N.J. 217, 225 (1980).

The Legislature has specifically charged school officials to maintain order, safety and discipline. The statutes give them authority to prevent disorderly conduct by pupils, N.J.S.A. 18A:25-2, and students are required to submit to such authority, N.J.S.A. 18A:37-1. Specifically, school officials have power to suspend pupils for illegal possession or consumption of drugs or alcohol, N.J.S.A. 18A:37-2(j), for assaulting teachers, N.J.S.A. 18A:37-2.1, or for other good cause. See N.J.S.A. 18A:37-2, -4. Other statutes allow them to deal specifically with pupils who are under the influence of drugs or alcohol, N.J.S.A. 18A:40-4.1 (principal shall notify parent); N.J.S.A. 18A:35-4a (board of education shall establish policies and procedures for evaluating and treating alcohol users). Finally, N.J.S.A. 18A:6-1

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grants specific power to seize weapons or other dangerous items and to quell disturbances.

Taken together, these statutes yield the proposition that school officials, within the school setting, have the authority to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. This holding comports with prevailing decisional law. Judge Frank Johnson has stated it thus in the context of a college dormitory search:

A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported [school] may not compel a "waiver" of that right as a condition precedent to admission. The [school], on the other hand, has an "affirmative obligation" to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student "waives" his right to Fourth Amendment protection or on whether he has "contracted" it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the [school's] supervisory duty. In other words, if the regulation—or, in the absence of a regulation, the action of the [school] authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere," then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students. [*Moore v. Student Affairs Comm. of Troy State University*, 284 F.Supp. 725, 729 (M.D.Ala.1968)(footnotes omitted)].

We agree with that analysis and we too "reject as unsound the notion that ... [students] waive their Fourth Amendment rights." See *Williams*, 84 N.J. at 225 (per-vasively regulated licensee does not "waive" constitutional rights). As in so many areas of the law, we must consider competing claims. Here we must weigh the individual student's rights against the school's obligation to maintain order. Cf. *State v. Williams*, 93 N.J. 39 (1983) (free press

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and fair trial rights); *In re Hinds*, 90 N.J. 604 (1982)(free speech and orderly trial). We are satisfied that the legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes.

III.

Finally, we must articulate the standard that should guide the school official in the conduct of the search. We reiterate the proposition that "[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of [the Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara*, 387 U.S. at 528, 87 S.Ct. at 1730, 18 L.Ed.2d at 935. Whenever warrantless searches are authorized by law, they "are themselves subject to the independent constitutional requirement of reasonableness." *In re Martin*, 90 N.J. at 314 n.9 (citing *Barlow's*, 436 U.S. at 312, 98 S.Ct. at 1820, 56 L.Ed.2d at 311).⁶

Courts have adhered to the probable cause standard when police have participated in the search. *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D.Ill.1976); *Piazzola v. Watkins*, 316 F.Supp. 624 (M.D.Ala.1970), *aff'd*, 442 F.2d 284 (5th Cir.1971); *M.J. v. State*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981); *People v. Bowers*, 72 Misc.2d 800, 339 N.Y.S.2d 783 (N.Y. Crim. Ct. 1973); *Annot.*, 49 A.L.R.3d 978, 987-89 (1973); *see also Waters v. United States*, 311 A.2d 835, 837-38 (D.C. Ct. App. 1973). If it should occur that a police-initiated search employs school officials for law enforcement purposes, courts will have little difficulty in finding a subterfuge. *Piazzola*, 316 F.Supp. at 628.

But when police have not participated in the search, courts have generally phrased the standard in terms less stringent than probable cause. The Supreme Court of Washington has outlined the reasons for this view:

⁶For example:

It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law." [*Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir.1980), *cert. den.*, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981)].

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The high school principal is not a law enforcement officer. His job does not concern the discovery and prevention of crime. His duty as the chief administrator of the high school includes a primary duty of maintaining order and discipline in the school. In carrying out this duty, he should not be held to the same probable cause standard as law enforcement officers. Although a student's right to be free from intrusion is not to be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order. [*State v. McKinnon*, 88 Wash.2d 75, 81, 558 P.2d 781, 784 (1977).]

We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence.

"This standard is closely akin to that articulated in the much-cited case of *People v. Jackson*, 65 Misc.2d 909, 319 N.Y.S.2d 731 (N.Y.App. Term 1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (N.Y.Ct.App.1972). That case sustained a student search in which the school official had "reasonable grounds for suspecting that something unlawful was being committed, or about to be committed." 65 Misc.2d at 914, 319 N.Y.S.2d at 736.

The majority of cases have adopted either the *Jackson* or *McKinnon* standard. E.g., *State v. Baccino*, 282 A.2d 869 (Del.Super.Ct.1971); *State v. D.T.W.*, 425 So.2d 1383 (Fla.Dist.Ct.App.1983); *People v. Ward*, 62 Mich. App. 46, 233 N.W.2d 180 (Mich.Ct.App.1975); *State in Interest of G.C.*, 121 N.J.Super. 108 (J.D.R.C.1972) ("reasonable suspicion"); *Tarter v. Raybuck*, 556 F.Supp. 625 (N.D. Ohio 1983)(dictum); *Stern v. New Haven Community Schools*, 529 F.Supp. 31 (E.D.Mich. 1981); *Bilbrey v. Brown*, 481 F.Supp. 26 (D.Or.1979); *M. v. Ball-Chatham Community Unit School Dist. No. 5 Bd. of Educ.*, 429 F.Supp. 288 (S.D.Ill.1977) ("reasonable cause to believe").

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In determining whether the school official has reasonable grounds, courts should consider "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." *McKinnon*, 88 Wash.2d at 81, 558 P.2d at 784; accord *Bellnier v. Lund*, 438 F.Supp. 47, 53 (N.D.N.Y.1977); *State v. D.T.W.*, 425 So.2d 1383, 1387 (Fla. Dist. Ct. App. 1983); *Doe v. State*, 88 N.M. 347, 352, 540 P.2d 827, 832 (N.M. Ct. App. 1975); *People v. D.*, 34 N.Y.2d 483, 489, 358 N.Y.S.2d 403, 408, 315 N.E.2d 466, 470 (N.Y. Ct. App. 1974); *In Interest of L.L.*, 90 Wis.2d 585, 600, 280 N.W.2d 343, 351 (Wis. Ct. App. 1979). Cf. *Tinker*, 393 U.S. at 513, 89 S. Ct. at 740, 21 L. Ed. 2d at 741 (school limit on constitutional right justified when action "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"). We also believe that "as the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause." *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979).

The standard we adopt will not, as the dissent suggests, abandon the schools to drug pushers and muggers. We could make the same arguments that it does about preserving order in a city subway or on its streets. Surely, law enforcement would be easier without the Constitution, but that is not the way that the Framers chose.

We believe that our approach represents the best way to vindicate each student's right to be free from unreasonable searches and to receive a thorough and efficient education. Teachers' hands will not be tied. Indeed, commentators have observed that teachers have a better vantage point than police for systematic observation of potentially criminal student activities and movements and thus can articulate the reasonable grounds for a search. *Trosch, Williams & DeVore*, "Public School Searches and the Fourth Amendment," 11 J.L. & Educ. 41, 55-56 (1982). In the long run, respect for law is the most cherished civic virtue that schools can impart. On that score, we agree with Justice Jackson:

...Boards of Education...have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason

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for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. [*Barnette*, 319 U.S. at 637, 63 S.Ct. at 1185, 87 L.Ed. at 1637].

IV.

Applying these principles to the cases, we conclude that both judgments must be reversed. In the case of T.L.O., the assistant principal did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order. A student has an expectation of privacy in the contents of her purse. Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.

The assistant principal's desire, legal in itself, to gather evidence to impeach the student's credibility at a hearing on the disciplinary infraction does not validate the search. Moreover, there were not reasonable grounds to believe that the purse contained cigarettes, if they were the object of the search. No one had furnished information to that effect to the school official. He had, at best, a good hunch. No doubt good hunches would unearth much more evidence of crime on the persons of students and citizens as a whole. But more is required to sustain a search.

In addition, although not necessary to our decision, even conceding the reasonableness of the purse opening, we would be hard pressed to sustain the balance of the search. The sight of rolling papers might justify looking for drugs but not "wholesale rummaging or browsing through a person's papers in the unparticularized hope of uncovering evidence of a crime." *State v. Smith*, 113 N.J.Super. 120, 135 (App.Div.1971).

In the case of Engerud, we also find lacking the necessary factual predicate for a reasonable ground to believe that his locker contained evidence in accordance with the test described. The official action was based only upon an "anonymous tip." The United States Supreme Court in revision of the *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), three-pronged test of informant's reliability, has stressed that "[its] decisions applying the totality of circumstances analysis ... have consistently recognized the value of corroboration of details of an informant's tip by independent police

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work." *Illinois v. Gates*, _____ U.S. _____, _____, 103 S.Ct. 2317, 2334, 76 L.Ed.2d 527 (1983). See also *Florida v. Royer*, _____ U.S. _____, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (brief stop, but not search, of person fitting drug courier profile justified without more). In this case there was neither a reliable informer nor independent corroboration. See *People v. D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (vague information from "confidential sources" insufficient).

We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. "[T]he Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582. For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal "effects" protected by the Fourth Amendment. A student is justified in believing that the master key to the locker will be employed either at his request or convenience. That a master key exists to gain access to a hotel room does not make it any less entitled to privacy. See *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856, 861 (1964); *United States v. Lyons*, 706 F.2d 321, 327-28 (D.C.Cir.1983). Had the school carried out a policy of regularly inspecting students' lockers, an expectation of privacy might not have arisen. Cf. *People v. Overton*, 20 N.Y.2d 360, 362, 283 N.Y.S.2d 22, 24, 229 N.E.2d 596, 598 (N.Y.Ct.App.1967), vacated, 393 U.S. 85, 89 S.Ct. 252, 21 L.Ed.2d 218 (1968), adhered to, 24 N.Y.2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (N.Y.Ct.App.1969) (vice-principal had occasionally inspected lockers).

We do not disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information that they possess. Such officials have immunity from damages for claims resulting from their good faith judgments. See *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). The issue here is not criticism of their actions but the adjudication of constitutional rights when students face juvenile or criminal charges.

V.

In conclusion, (1) the obligation of school officials to furnish a thorough and efficient education and the statutory grants of power to school officials to maintain discipline confer the authority to conduct warrantless administrative searches on school premises;

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(2) the Fourth Amendment protects students from unreasonable administrative searches and seizures;

(3) searches are reasonable in this context if school officials have reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, and the search itself is reasonable in scope;

(4) evidence otherwise obtained as a result of a warrantless search is illegally obtained and is inadmissible in criminal proceedings against students.

Having found that evidence was obtained in these cases in violation of these principles, we reverse the judgments below and direct that the evidence be suppressed.

SCHREIBER, J., dissenting.

Rather than tying the hands of school administrators in their formidable struggle to return our schools to places of learning and development, I would permit them to take reasonable steps to enforce valid school regulations. We must not lose sight of the fact that school administrators have an obligation to all children to insure that they receive a quality education. In fulfilling this obligation to all students, school authorities frequently have a duty to invade an individual public school student's privacy to determine whether there have been infractions of, and to enforce, school regulations. Nonetheless, administrators do not have an unlimited right to make any intrusion they desire, for the students have a constitutional right "to be secure in their persons, houses, papers and effects against *unreasonable* searches and seizures" (emphasis supplied).

It is important to recognize what this case is *not*. The Court is not faced with police seeking to make a search or seizure that may lawfully be consummated only after a warrant has been obtained upon a showing of probable cause. Indeed, it should be noted that the police need not always satisfy the standard of probable cause. "When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *United States v. Place*, _____ U.S. _____, _____, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). See *Illinois v. Lafayette*, _____ U.S. _____, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (probable cause is irrelevant for inventory search made when arrested person is to be

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incarcerated); *United States v. Villamonte-Marquez*, _____ U.S. _____, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983) (customs officials boarding vessel for routine inspection of documents held reasonable though no probable cause or suspicion); *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (temporary detention of occupants while search of premises pursuant to a warrant is conducted is justifiable if based on articulable suspicion not amounting to probable cause); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (when made in accordance with standard procedure, not unreasonable for police to make inventory search without probable cause of automobile impounded for parking violations); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607, 617 (1975) ("when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion"); *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1884, 20 L.Ed.2d 889, 911 (1968) (stop and frisk permissible if police officer has an articulable suspicion "that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous....").

The public school environment justifies a standard other than probable cause in deciding whether a public school administrator's investigations transgress reasonableness. Many jurisdictions have required that a search or seizure involving a public school student be predicated upon a "reasonable suspicion." See, e.g., *State in the Interest of G.C.*, 121 N.J.Super. 108, 117 (Cry. Ct. 1972); *People v. Jackson*, 65 Misc.2d 909, 914, 319 N.Y.S.2d 731, 736 (App. Term 1971) *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972); see also, e.g., *Doe v. State*, 88 N.M. 347, 352, 540 P.2d 827, 832 (Cr.App. 1975) (reasonable suspicion or reasonable cause to believe). This criterion has the advantage of having been applied by the Supreme Court. See *United States v. Brignoni-Ponce*, 422 U.S. at 882, 95 S.Ct. at 2580, 45 L.Ed.2d at 617. I do not know whether it functionally differs from the majority's "reasonable grounds to believe." To the extent that it requires more than a well-grounded suspicion, I would reject it. I reach that conclusion because a more stringent standard is not suitable in the public school educational setting.

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Attendance at public school is compulsory. *N.J.S.A. 18A:38-25*. The State is thereby assembling large numbers of young people in schools and has a duty to protect students from being harmed by others and by themselves. The students have a right to pursue their academic endeavors without exposure to dangers or overwhelming distractions. In other words, school authorities have a duty to maintain "a proper educational environment." 3 *W. LaFave, Search and Seizure* § 10.11, at 458 (1978).

School administrators must have broad supervisory and disciplinary powers, particularly because protecting students from dangers posed by anti-social activities is directly related to the educational process.¹ This goal has been supported by the Department of Education, which in its *Final Report, supra n. 1*, at 59, states:

In order to achieve the goals of instructional programs, local boards must actively assist students and staff by assuring a safe atmosphere, free from danger and disruption and one which promotes a positive environment conducive to learning. Disruptive behavior constrains the learning process and lowers school morale at all levels. A discipline policy must hold students accountable and consequently apply remedial and preventive steps that will ensure the safety and promote the education of all pupils.

In this respect the words of Judge Keating of the New York Court of Appeals in *People v. Overton*, 20 *N.Y.2d* 360, 362, 229 *N.E.2d* 596, 597-98, 283 *N.Y.S.2d* 22, 24-25 (1967), vacated, 393 *U.S.* 85, 89 *S.Ct.* 252, 21 *L.Ed.2d* 218 (1968), adhered to on rehearing, 24 *N.Y.2d* 522, 249 *N.E.2d* 366, 301 *N.Y.S.2d* 479 (1969), bear repeating:

¹The extent and nature of the problems in our schools are well documented. In July 1982, the Division of Research, Planning and Evaluation of the Department of Education published its *Final Report* required by *N.J.S.A. 18A:4-29.1*, repealed and supplemented by *N.J.S.A. 18A:17-46*. Between July 1, 1979 and June 30, 1981, school districts reported 21,721 incidents of violence, vandalism, drug abuse or any combination of these three. *Final Report on the Statewide Assessment of Incidents of Violence, Vandalism and Drug Abuse in the Public Schools 2.4.5* (July 1982) [hereinafter cited as *Final Report*]. This staggering total may well understate the actual figures due to under-reporting. *Id.* at 2.

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The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.

It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to antisocial behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age increases the danger. Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps, if the charge is substantiated.

In light of such policy considerations, the "reasonableness" of the searches in the cases before us must be measured against the nature and extent of the intrusions involved. I part company with the majority's opinion in its assessment of the reasonableness of the school officials' conduct in these cases under either a "reasonable grounds to believe" or "reasonable suspicion" standard. Regardless of the standard employed these minimal invasions of a student's privacy were a valid exercise of a school administrator's authority.

After paying lip service to the principle that school officials have the authority to conduct reasonable searches necessary to maintain safety, order and discipline within the schools, *ante at 343*, the majority evaluates the conduct of the school official as if he were a policeman. If the school authorities acted properly, it is implicitly conceded that use of that evidence in a subsequent juvenile delinquency or criminal proceeding would be lawful. Our conclusion in these two cases centers on the propriety of the actions of the school administrators. No claim is made that the school officials were acting in concert with or on behalf of the police.

T.L.O.

The issue in *T.L.O.* is whether the assistant principal acted reasonably in opening the student's purse. A teacher had reported

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that she saw T.L.O., a 14-year-old girl, smoking in the girls' lavatory. Smoking at that location was forbidden by school regulations. When the assistant principal questioned T.L.O. as to whether she had "been smoking in the bathroom," T.L.O. replied that she did not smoke. The assistant principal asked for her purse and opened it. There--right on top--was a package of Marlboro cigarettes. The immediate question is, was the opening of the purse "reasonable" under these circumstances.

No one questions the validity of the school regulations. Smoking not only involves fire hazards, but also threatens the health and comfort of others. See *N.J.S.A. 26:3D-18* (requiring public schools to display sign "indicating that smoking is prohibited in the building except in designated areas"); *N.J.S.A. 26:3D-9* (prohibiting, with exceptions, smoking in all health care facilities); *N.J.S.A. 26:3D-3* (prohibiting smoking "in every passenger elevator in every building other than a single family dwelling"). School officials undoubtedly had a right to enforce that regulation and, in doing so, to investigate infractions and identify the wrongdoer. T.L.O.'s response was not simply a denial of having smoked in the lavatory, but a claim that she did not smoke at all. Her credibility was at issue. Was the school teacher's visual observation correct? Was T.L.O.'s denial predicated on the claim that she did not smoke at all to be believed? By denying that she smoked at all, she made the truth of that assertion at least relevant, and perhaps dispositive, of the accuracy of the teacher's allegation. Was it reasonable simply to open the purse without searching or rummaging through it? There the cigarettes sat on top, plainly visible. The existence of the cigarettes under these circumstances was directly related to the assistant principal's investigation. Once the cigarettes were found he was assured that T.L.O. had not been truthful and had probably violated the school regulation. When balancing the intrusiveness of searches such as opening the purse to see the immediately visible contents, with the broad supervisory authority of the school administrator to enforce a policy prohibiting smoking, a policy grounded in safety and health, the assistant principal was not only warranted, but also might well have been derelict had he not acted as he did.

Once the cigarettes were removed, the drug paraphernalia were in plain view, as the trial court found. Thereafter the assistant principal was justified in continuing his search to determine the extent of that violation.

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Engerud

Joseph Abate, vice-principal of Somerville High School, had heard, six months to a year before the incident giving rise to this case, that Jeffrey Engerud, a student at the high school, had been dealing in illegal drugs. Thereafter on one or two other occasions he heard rumors to the same effect. Michael Crisci, principal of the high school, had also heard that Engerud was involved with drugs. On January 29, 1980 the police advised Mr. Abate that they had received a phone call from the father of a student charging Engerud with selling drugs at the high school and threatening to take matters into his own hands if the police did not stop it.

Mr. Abate, Mr. Crisci and Mr. Carpenter, an assistant principal, discussed the matter. Mr. Crisci decided that it was "reasonable" under these circumstances to search Engerud's locker to see if anything might be there. That belief being well-founded, the search should be sustained. In upholding a search of a student's locker in *People v. Overton*, the court commented:

Indeed, it is doubtful if a school would be properly discharging its duty of supervision over the students, if it failed to retain control over the lockers. Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. [20 N.Y.2d at 363, 229 N.E.2d at 598, 283 N.Y.S.2d at 25].

Furthermore, Mr. Crisci had a passkey that could open any locker, a fact of which the students were aware. The student's expectation of privacy in the locker must assuredly have been diminished. A student had the right to exclude other students, but not school authorities who might reasonably be expected to inspect the locker upon reasonable belief or suspicion that contraband was hidden there.²

²The majority emphasizes a student's expectation of privacy in a locker by characterizing it as a "home away from home." *Ante* at 349. Needless to say, the record in this case does not support that assertion. It would be well for school authorities to dispel any such notion of privacy by notifying students that their lockers are subject to inspections by the school principal or vice-principal when he has a reasonable suspicion that a search is justifiable to insure compliance with school regulations. 3 W. LaFare, *Search and Seizure* § 10.11, at 463 & n. 54 (1978).

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Various rumors that came to the attention of the authorities at different times, coupled with the telephone call of an irate parent, certainly justified the school authorities in taking action.³ No matter what standard is applied--reasonable grounds to believe or a reasonable suspicion that Engerud was dealing in goods--the opening by the school principal of the locker, to which he had a key, cannot be said to have been an undue intrusion of Engerud's right of privacy in the locker.

As a matter of policy I would encourage school administrators to investigate violations of rules and regulations designed for the welfare of the student body. A similar position was expressed by the Sixth Essex County Grand Jury, investigating drug abuse among school age children in Essex County, which concluded:

We must face up to the fact that, because of its very nature, the school is the natural focal point for bad as well as good. Administrators must recognize that drugs are being used in their schools. Society must understand that the first step in eradicating the problem is to recognize its existence. *School officials who recognize the problem of drug abuse and implement steps to cure the problem must be applauded. Their efforts must be met with understanding and sympathy by the community they are serving. [Presentment of Sixth Essex County Grand Jury for the 1978 Term 21 (1979) (emphasis added)].*

Today this Court has substituted its judgment as to what constitutes reasonableness for the judgments of those who are charged with the responsibility for school discipline and supervision, as well as for those of the two trial judges. I would prefer to support public school administrators rather than frustrate their efforts to overcome what has become an overwhelming problem.

³The fact that the caller did not give his name does not negate a reasonable belief or suspicion in view of the several rumors that had come to the attention of the authorities. Cf. *Illinois v. Gates*, _____ U.S. _____, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983) (information from an anonymous informant is to be viewed in totality of circumstances to determine existence of probable cause). The majority's reliance upon *Aquilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and other cases relating to probable cause is misplaced. The majority by its own terms would require "reasonable grounds to believe," not probable cause, in public school searches. Evidential prerequisites for a reasonable belief or suspicion in a non-criminal matter differ from those necessary to infer probable cause in police enforcement.

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I would uphold both searches and affirm the judgments.

Justice GARIBALDI joins in this opinion.

For reversal--Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK and O'HERN--5.

For affirmance--Justices SCHREIBER and GARIBALDI--2.

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OPINION OF THE SUPERIOR COURT OF
NEW JERSEY - APPELLATE DIVISION
DECIDED JUNE 30, 1982

STATE IN THE INTEREST OF T.L.O.,
JUVENILE-APPELLANT.

Superior Court of New Jersey
Appellate Division

Argued June 1, 1982--Decided June 30, 1982.

Before Judges MILMED, JOELSON and GAULKIN.

Lois DeJulio, First Assistant Deputy Public Defender, argued the cause for appellant T.L.O. (*Stanley C. Van Ness*, Public Defender, attorney).

Victoria Curtis Bramson, Deputy Attorney General, argued the cause for respondent State of New Jersey (*Irwin I. Kimmelman*, Attorney General, attorney; *Victoria Curtis Bramson* and *Mark Paul Cronin*, Deputy Attorney General, on the brief).

PER CURIAM.

We affirm the denial of the motion to suppress the evidence produced by the search of the juvenile's purse substantially for the reasons expressed by Judge Nicola in his opinion reported at 178 N.J. Super. 329 (J. & D.R.Ct.1980).

However, we find that neither the record nor the findings and conclusions of the trial judge are sufficient for us to determine the sufficiency of the *Miranda* waiver which was assertedly made by or on behalf of the juvenile immediately before her resumed questioning by the police officer. We must therefore remand the matter to the trial court for further proceedings and findings and conclusions in light of the principles enunciated in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and *State v. Fussell*, 174 N.J. Super. 14 (App.Div.1980).

The final adjudication of delinquency entered on January 7, 1982 is vacated and the matter is remanded for further proceedings consistent herewith. We do not retain jurisdiction.

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JOELSON, J.A.D., dissenting in part.

The opinion of the trial judge, *State in Interest of T.L.O.*, 178 N.J.Super. 329 (J. & D.R.Ct.1980), acknowledges that "...public school officials are to be considered governmental officers, ..." *Id.* at 340. See also *Durgin v. Brown*, 37 N.J. 189, 199 (1962); *Kaveny v. Bd. of Com'rs of Montclair*, 69 N.J.Super. 94, 101-102 (Law Div. 1961), *aff'd* 71 N.J.Super. 244 (App.Div.1962); *State in the Interest of G. C.*, 121 N.J.Super. 108 (J. & D.R.Ct.1972). The trial court's opinion further recognizes that juveniles in public schools are not without constitutional rights. 178 N.J.Super. at 337. See also *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). However, although stating that public school students are entitled to Fourth Amendment rights, the trial court chose to follow those jurisdictions which apply a lower standard of reasonableness with regard to searches and seizures conducted by public school authorities against children in school.

The result arrived at by the trial court and approved by my colleagues in the majority would deny to a high school girl suspected of an infraction of a school regulation the same Fourth Amendment protection given to an out-of-school juvenile suspected of a violation of law, or even to an adult suspected of the most heinous crime. As anomalous as this might appear, it must be acknowledged that there is a special relationship between pupils and school authorities, and that the reasonableness of a search and seizure should be assessed in the context of that relationship. However, along with such an acknowledgment comes a need for the exercise of care lest the standard of reasonableness should be permitted to sink so low as to legitimize the search and seizures that took place in the case under review.

Although the trial judge in the opinion which has been adopted by my colleagues gave lip service to the Fourth Amendment, he applied the diminished standard of reasonableness in such a way as to render the protection of the Fourth Amendment virtually unavailable to juveniles in public schools who are suspected of violation of school regulations. As the trial judge noted, some jurisdictions flatly hold that the Fourth Amendment need not be applied in a school setting. 178 N.J.Super. at 339. However, the New Jersey Legislature has

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decreed otherwise in providing that juveniles shall be accorded "[t]he right to be secure from unreasonable searches and seizures." *N.J.S.A. 2A:4-60*. The Fourth Amendment protection of juveniles thus having been confirmed, courts should not effectively deny Fourth Amendment rights to school children while at the same time proclaiming that those rights exist.

The search we are dealing with was conducted in order to ascertain whether the juvenile had violated a school regulation by smoking a tobacco cigarette in an unpermitted location. The search revealed marijuana violations. The trial court in upholding the search relies on the concept of *in loco parentis*. *178 N.J. Super. at 338*. That concept, which is usually applied for the purpose of protecting a child, is being used here to strip the juvenile of constitutional protection. It would be rare parents indeed who would turn their daughters over to the police the first time they find her to possess or even distribute marijuana. It is unthinkable that a parent so finding could be successfully prosecuted for not reporting the information to the police, whereas a school authority would most likely not be accorded the same tolerance.

Nevertheless, as already stated, it must be recognized that the *sui generis* relationship between school authorities and pupils requires a different standard of reasonableness concerning search and seizure. For instance, if a teacher has been informed that a school child has matches in his pocket and has announced his intention to roast marshmallows in the clothes closet, an immediate search of the youngster following his denial of possessing matches would be not only justified but necessary. Common sense must be used on a case by case basis with due regard to the danger that might reasonably be suspected, the seriousness of the suspected misconduct, or the over-riding need to enforce discipline in a given situation. The trial court's opinion suggests guidelines applicable to a lowered standard of reasonableness, *178 N.J. Super. at 342*, but the record before us casts doubt about the validity of the search here even under the very guidelines suggested.

A fuller discussion of the facts of the case is now needed. According to the trial judge's factual review, a high school teacher observed

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T.L.O. and another girl smoking cigarettes in the girls' lavatory. The teacher immediately brought the girls to the vice-principal, and upon being asked whether she had been smoking, T.L.O. replied that she did not smoke at all. Thereupon, the vice-principal inspected her purse. His testimony was that as he reached into the pocketbook to remove a package of Marlboro cigarettes, he observed "rolling papers." He then looked further and found what appeared to be marijuana,¹ paraphernalia for smoking marijuana, and some empty plastic bags. He stated that he then went on to look at "all the compartments," and that in one of them he found index cards and letters between T.L.O. and another juvenile, which he read. They indicated drug distribution. He also opened a wallet containing \$40.98 found in the compartment. The police were immediately called, and they took T.L.O. to police headquarters.

The juvenile was suspected of smoking ordinary cigarettes. There is no indication whatever, nor has it been charged, that she smoked marijuana in school. The only thing that a search of the juvenile's purse could have disclosed as to tobacco cigarettes was whether or not she possessed them. Yet such possession would not have constituted an infraction of any rule or law. It appears from the opinion of the trial court that the regulation which the juvenile was suspected of violating was that of smoking in an area not designated for that purpose. There was no school regulation or policy which flatly prohibited students from possessing cigarettes or even from smoking them in permitted areas. *178 N.J. Super. at 341-342.* Nor can it be said that the search was necessary to gain information in order to avert the danger of fire attendant upon smoking in an unpermitted location. The vice-principal already had the direct account of the teacher who had personally witnessed the infraction by T.L.O. and another. Thus, the search was not conducted for the purpose of protection or for the maintenance of school discipline, but for the purpose of impeaching the credibility of the juvenile. Such a search is unreasonable even under a lowered standard, and its unreasonableness was exacerbated by its scope.

There is no doubt widespread frustration because of the exclusionary rule which bars from evidence material obtained through an improper search and seizure even though such search has obviously revealed the person searched to be guilty of having violated the criminal law.

¹The net weight of the marijuana was stipulated to be 5.40 grams.

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Such frustration is not difficult to understand, but the problem should not be addressed by our riding rough-shod over the rights of a juvenile in school, diminished though these rights may be.

I would reverse as to the denial of the motion to suppress the evidence obtained from the search and seizure.

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OPINION OF THE JUVENILE AND DOMESTIC RELATIONS COURT - MIDDLESEX COUNTY, NEW JERSEY, DECIDED SEPTEMBER 26, 1980

STATE IN THE INTEREST OF T.L.O.

Juvenile and Domestic Relations Court
Middlesex County

September 26, 1980.

Frederick A. Simon for movant (*Rosenberg & Simon*, attorneys).
Kenneth J. Lebrato, Assistant Prosecutor, for the State of New
Jersey.

NICOLA, P.J.J. & D.R.

This written opinion is intended to supplement the oral opinion
previously rendered by the court.

A complaint was filed in this court alleging that a 15-year-old
juvenile possessed marijuana with the intent to distribute, in viola-
tion of *N.J.S.A. 24:21-20(a)(4)* and *24:21-19(a)(1)*. The juvenile,
herein referred to as T.L.O., was accused of illegally possessing mari-
juana found in her purse. Evidence obtained through a search of the
juvenile's purse by a school's vice-principal indicated that the juvenile
had been selling marijuana to other students in school.

Prior to this hearing on the complaint the juvenile filed a motion
in the Superior Court, Middlesex County, Chancery Division, to show
cause why T.L.O. should not be reinstated in school, having been
suspended for smoking cigarettes and possessing marijuana. Judge
David Furman, J.S.C., heard the matter on March 31, 1980 and
upheld the suspension for smoking cigarettes but vacated the suspen-
sion imposed for possession of marijuana. The court found that the
suspension for possession of marijuana resulted from evidence ob-
tained in a warrantless search of the juvenile's purse, in violation
of the Fourth Amendment's guarantees against unreasonable
searches and seizures.

Presently before the court for its consideration is a motion to dismiss
the complaint and suppress the evidence. The juvenile argues

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that the complaint should be dismissed on the basis of *res judicata* and collateral estoppel stemming from the prior proceeding. Additionally, the juvenile argues that her due process rights were violated by an unlawful search and seizure conducted by the assistant vice-principal and seeks to have this evidence suppressed.

This complaint arises from an occurrence on March 7, 1980. A Piscataway High School teacher observed the juvenile and another girl smoking cigarettes while in the girls' lavatory. The teacher escorted the girls to the assistant vice-principal's office and accused them of violating the school's no-smoking restriction. When asked by the vice-principal whether she had, in fact, been smoking in the girls' room, T.L.O. replied that "she didn't smoke at all." With this conflicting response the vice-principal requested the student's purse and upon inspection found a package of cigarettes plainly visible. While removing the cigarettes, marijuana and marijuana paraphernalia became visible. Further inspection revealed \$40.98 in single dollar bills and change as well as a handwritten letter by T.L.O. to a friend asking her to sell marijuana in school.

The assistant vice-principal summoned the police and turned over the marijuana and paraphernalia to them. The juvenile's parents were also notified. In the presence of her mother at police headquarters, T.L.O. admitted to selling marijuana in school, after being advised of her rights. She stated that on the day in question, she had sold approximately 18 to 20 marijuana cigarettes for a price of one dollar each.

T.L.O. was suspended from school for three days for smoking cigarettes and seven days for possession of marijuana. As previously indicated, the juvenile obtained an order to show cause why she should not be reinstated in school. At the hearing on that matter the judge found that the search conducted by the vice-principal violated the Fourth Amendment guarantees. Any consent to the search of the purse by the juvenile was ruled ineffective due to a failure to advise her that she had a right to withhold such consent.

The juvenile now seeks to raise the findings of the civil proceeding as a bar to this matter through a motion to dismiss. She asserts the doctrines of *res judicata* and collateral estoppel. Additionally, the juvenile wishes to suppress the evidence by addressing the constitutionality of the search conducted by the vice-principal.

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This court will first address the constitutionality of the search and seizure; more specifically, the issue is whether or not a school official is subject to the Fourth Amendment and the standard of probable cause which must exist before said official may engage in a search of a student on school grounds in order to enforce a disciplinary rule.

The Fourth Amendment to the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated"

The Fourth Amendment does not prohibit all searches and seizures, but only unreasonable ones. The reasonableness of a search is determined by a balancing of the government's interests in conducting a search with the individual's right to be free from intrusion. See *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Generally, police officials are required to obtain a search warrant based upon probable cause except for a few "jealously and carefully drawn" exceptions. *Collidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). To avoid circumvention of the probable cause requirement through warrantless searches the same standard of probable cause is imposed to justify a warrantless search. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). There have been instances, however, where the government's need to search has been held to outweigh the intrusion upon the person's privacy, and the Supreme Court has allowed a lower standard as justification for a constitutionally valid search. *Terry v. Ohio*, 392 U.S. 1, 88, S.Ct. 1868, 20 L.Ed.2d 889 (1968) (stop and frisk); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (routine stops at permanent border checkpoints).

The Supreme Court, however, has long been vigilant in protecting the rights secured by the Fourth Amendment, as in evidenced by its adoption of the exclusionary rule. The exclusionary rule, as enunciated in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), allows suppression of evidence seized in violation of the Fourth Amendment. Initially applied only in federal courts, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) has since extended the rule to the states through the Fourteenth Amendment. However, the court has held that the Fourth

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Amendment's proscription only applies to unreasonable searches and seizures made by governmental officials. *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

The vigilance of the Supreme Court is evidenced as well by its recognition of the constitutional rights and protections belonging to juveniles. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (procedural due process); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (requiring proof beyond a reasonable doubt).

The court has made it clear that juveniles, as students, do not lose their constitutional rights when they enter the school house. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). *Tinker* involved an expression of the First Amendment rights by high school students. The students were suspended for wearing black arm bands to protest the hostilities of the Vietnam War. The court held that the students' actions constituted speech protected by the First Amendment to the Constitution, and that they therefore could not be suspended for expressing their views in a non-disruptive manner:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). [*Tinker v. Des Moines School Dist.*, 393 U.S. at 512-13, 89 S.Ct. at 739-40; footnotes omitted]

Yet, the court specifically went on to limit the First Amendment rights given to students:

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But conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. [Ibid.]

This limitation, intended to protect the classroom decorum, was also recognized in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Although *Tinker* and *Goss* did not deal with the Fourth Amendment rights of students, the same recognition of schoolroom decorum appears to be appropriate when dealing with Fourth Amendment rights. *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (Sup. Ct. 1977).

Indeed, the rights of juveniles are not coextensive with the rights of adults, regardless of their student status. The Supreme Court has stated:

...[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults... The well-being of its children is of course a subject within the state's constitutional power to regulate... [P]arents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of the laws designed to aid discharge of that responsibility." [Ginsberg v. New York, 390 U.S. 629, 638-639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195]

A teacher's responsibility for and control over a student is derived from the concept of *in loco parentis*. It is stated as a general rule that the teacher stands in the place of the pupil's parents, and may exercise powers necessary to control, restrain and correct students within reason, to enable him to properly perform his duties and provide a proper education. 79 C.J.S., *Schools*, § 493. In New Jersey the concept is applied through statute requiring the student to recognize the authority of the teacher. The pertinent statute states:

Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them. [N.J.S.A. 18A:37-1]

See, also, N.J.S.A. 18A:37-2 to 5, 18A:25-2.

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A number of courts have already addressed the issue of searches of students in school by school officials. Their approaches to the applicability of the Fourth Amendment and exclusionary rule have varied and may be placed in the following categories:

(1) The Fourth Amendment does not apply because the school official acted *in loco parentis*, that is, he stands in the place of the parents; *In re G.*, 11 Cal.App.3d 1193, 90 Cal.Rptr. 361 (D.Ct.App.1970); *In re Donaldson*, 269 Cal.App.2d 509, 75 Cal.Rptr.220 (D.Ct.App.1969); *People v. Stuart*, 63 Misc.2d 601, 313 N.Y.S.2d 253 (1970); *Commonwealth v. Dingfelt*, 227 Pa.Super.380, 323 A.2d 145 (Super.Ct.1974); *Mercer v. State*, 450 S.W.2d 715 (Tex.Civ.App.1970);

(2) The Fourth Amendment applies, but the exclusionary rule does not; *Doe v. Renfrow*, 475 F.Supp.1012 (N.D.Ind.1979); *United States v. Coles*, 302 F.Supp.99 (D.Me.,N.D. 1969); *State v. Young*, 234 Ga. 488, 216 S.E.2d 586 (Sup.Ct.1975); *State v. Wingerd*, 40 Ohio App.2d 236, 318 N.E.2d 866 (Cr.App.1974);

(3) The Fourth Amendment applies but the doctrine of *in loco parentis* lowers the standard to be applied in determining the reasonableness of the search; *Bilbrey v. Brown*, 481 F.Supp.26 (D.C.Or.,1979); *In re W.*, 29 Cal.App.3d 777, 105 Cal.Rptr. 775 (D.Ct.App.1973); *In re C.*, 26 Cal.App.3d 320, 102 Cal.Rptr. 682 (D.Ct.App.1972); *State v. Baccino*, 282 A.2d 869 (Del.Super. 1971); *State v. F.W.E.*, 360 So.2d 148 (Fla.D.Ct.App.1978); *People v. Ward*, 62 Mich.App. 46, 233 N.W.2d 180 (App.Ct.1975); *In re G.C.*, 121 N.J.Super. 108, 296 A.2d 102 (J.Dr.Ct.1972); *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Sup.Ct.1975); *People v. Singletary*, 37 N.Y.2d 310, 372 N.Y.S.2d 68, 333 N.E.2d 369 (Cr.App.1975); *People v. D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (Cr.App.1974); *People v. Jackson*, 65 Misc.2d 909, 319 N.Y.S.2d 731 (App.Term, 1st Dept. 1971), *aff'd*, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (Cr.App.1972); *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (Sup.Ct.1977); *In re L.L.*, 90 Wis.2d 585, 280 N.W.2d 343 (Sup.Ct.1979);

(4) The Fourth Amendment applies and requires a finding of probable cause in order for the search to be reasonable; *Picha v. Wielgos*, 410 F.Supp. 1214 (W.D.Ill.1976); *State v. Mora*, 307 So.2d 317 (La.1975), *vacated* 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 29; 330 So.2d 900 (La.1976).

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This court, in accordance with the New Jersey case of *In re G.C.*, decided by a court of comparable jurisdiction finds that public school officials are to be considered governmental officers, and therefore the approach taken by the preceeding catagory of cases, which holds the Fourth Amendment applicable to school searches but lowers the reasonableness standard as a result of the application of the *in loco parentis* doctrine, to be the most persuasive.

The court in the recent case of *In re L.L.*, in a review of the authorities of this issue, analyzed the interests involved which allowed the lower standard sufficient to satisfy the Fourth Amendment requirement of reasonableness. These interests may be summarized as: (1) the State's strong interests in providing an education in an "orderly atmosphere which is free from danger and disruption"; (2) the student's reasonable expectation of privacy while in school, which is lower than in other places because of the expected restraint exercised over students for security or discipline; (3) "the realities of the classroom present few less intrusive alternatives to an immediate search for suspected dangerous or illegal items or substances." 90 Wis.2d at 600-601, 280 N.W.2d at 350-51.

The Federal District Court in *Doe v. Renfrow* considered the factor of an absence of any normal or justifiable expectation of privacy on behalf of the students. The court stated that students cannot be said to enjoy any absolute expectation of privacy while in the classroom setting because of the constant interaction among students, faculty and school administrators. A reasonable right to inspection is necessary for the school's performance of its duty to protect all students and the educational process. The court went on to state:

There is no question as to the right, and indeed, the duty of school officials to maintain an educationally sound environment within the school. It is the responsibility of the school administrator to insure the proper functioning of the educational process ... Maintaining an educationally productive atmosphere within the school rests upon the school administration certain heavy responsibilities. One of these is that of providing an environment free from activities harmful to the educational function and to the individual student. [475 F.Supp. at 1020]

In accordance with the foregoing standards, the United States District Court, in *Bilbrey v. Brown*, 481 F.Supp. 26 (D.Or.1979),

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a case in which plaintiffs challenged the constitutionality of a school district's search and seizure policies as set forth in the district's "Minimum Standards for Student Conduct and Discipline," held that such searches may properly be conducted when a school official has reasonable cause to believe a student has violated school policy.

Therefore, this court finds that a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.

The present case deals with a school standard of discipline and not criminal activity. The standard of reasonableness must be applied, whether we are dealing with noncriminal activity or a school standard of discipline. A reasonable standard is defined as one designed to protect the health, safety and welfare of the child involved, as well as the student population. School officials, therefore, have the right to deliberately restrict smoking to certain areas within the school. Such designations are not arbitrary, but rather based on the school official's experience and knowledge of fire codes and standards. When a school drafts its smoking regulations it considers the following factors: the structure of the building with respect to fire resistance (*e.g.*, fire walls); the ability to control smoking in the area where it is permitted (*e.g.*, by teacher supervision) in order to insure that the privilege is not abused and to reduce the threat of hostile fires; the availability of fire escapes. A further consideration, of increasing importance, is the right of the nonsmoking student to be free from exposure to the detrimental effects of cigarette smoke. Certainly the potential harm and detrimental effect that can be caused by the abuse of smoking privileges are as serious as those which may result from criminal activity committed within the schools. School officials, therefore, must have the same rights to investigate and control the abuse of noncriminal activities as they do in instances involving weapons and drugs. Thus, this court finds that the school's nonsmoking regulation has satisfied the reasonableness standard.

While accepting a lower standard in determining the reasonableness of a search, this court is aware of the other factors which the courts have stated would be considered in determining the sufficiency of cause to search. The factors to be judged are: (1) the child's age, history and school record; (2) the prevalence and seriousness of the problem in the school to which the search was directed;

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(3) the exigency of the situation requiring an immediate warrantless search; (4) the probative value and reliability of the information used as a justification for the search; (5) the teacher's prior experience with the student. *In re L.L.*, *State v. McKinnon*, *Bellnier v. Lund*, *Doe v. State* all *supra*. These factors should serve as a guideline in determining whether some reasonable suspicion of a crime or violation of school regulation has occurred.

Applying the foregoing to the facts of this case, it is apparent that the vice-principal had a right to conduct a search of the student. A teacher had observed the student smoking in an area where such was prohibited. Although the student denied smoking, the school official had a duty to investigate and determine whether a violation of the school's code had occurred. The nature of this situation dictated the actions taken by the vice-principal.

Although the vice-principal was justified in opening the purse, an exploratory search was not permissible. His limited purpose was to determine whether the violation, which was reasonably suspected, had, in fact, occurred. However, once the purse was open, the contents were subject to the "plain view" doctrine—an exception to the warrant requirement. Under the plain view doctrine a law enforcement officer may seize any object that is in his plain view if he has a right to be in the position to have that view. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968); *State v. McKnight*, 52 N.J. 35 (1968). Upon finding the marijuana and paraphernalia, the vice-principal was justified in continuing his search to determine the extent of that violation.

Concerning the juvenile's motion to dismiss, the issue raised is whether the present criminal proceeding in Juvenile and Domestic Relations Court is barred by the former hearing at which the juvenile sought reinstatement in school. As stated, the juvenile contends that the complaint should be dismissed on the basis of *res judicata* and collateral estoppel. The State argues that those doctrines which have been incorporated into the criminal law through the Double Jeopardy Clause, are inapplicable and do not bar the present proceeding.

In *State v. Redinger*, 64 N.J. 41 (1973), our Supreme Court stated:

"Collateral estoppel has been described as an awkward phrase. Essentially, it means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same

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parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). In *Ashe*, the Supreme Court held that collateral estoppel as applied in the Federal decisions must be considered a part of the Fifth Amendment's guaranty against double jeopardy and binding on the States through the 14th Amendment under *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). [at 45-46]

The applicability of collateral estoppel to the present case appears to hinge upon the question of sufficiency of identity of the parties in the two proceedings. A similar situation was considered in *Kugler v. Banner Pontiac-Buick, Opel, Inc.*, 120 N.J. Super. 572 (Ch.Div.1972). In that case the Attorney General filed a complaint against the defendant for a consumer fraud violation, seeking relief under the applicable statute. An order to show cause was issued under the Consumer Fraud Act. At the return hearing on the order to show cause defendant moved to discharge the order based on the doctrines of *res judicata* and collateral estoppel. Prior to the filing of the complaint defendant had appeared in the municipal court on a violation of a similar statute. In that proceeding defendant was acquitted upon the same operative facts. As a result, the court in the second proceeding was confronted with the issue of whether collateral estoppel would apply to the action taken by the Attorney General.

That court considered the identity of the parties a requisite to the application of that doctrine and stated: "Certainly it could not have been intended that a proceeding in the name of the State by a local prosecutor would forever collaterally stop the Attorney General in an *ex. rel.* action or as legal advisor and attorney to an administrative agency." 120 N.J. Super. at 580. As a result, the court denied defendant's motion to dismiss on the grounds of *res judicata* and collateral estoppel.

In the present case the juvenile argues that the parties involved in the prior proceeding are identical in interest with those in the present hearing. She argues that although the State of New Jersey was not named in the prior proceeding concerning the student's reinstatement, the Piscataway Board of Education stood in precisely the same position as the State does in this hearing. However, this court finds, in accordance with the reasoning of the court in *Kugler*, that the State's goal is substantially different from that of the board of education.

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The distinctions between the powers and duties of the county prosecutor and board of education are delineated in the statutes. Compare *N.J.S.A. 18A:11-1* with *N.J.S.A. 2A:158-5*. It is obvious that the board of education is not subject to the same mandate as the prosecutor, to "use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws." *N.J.S.A. 2A:158-5*. In contrast, administration and management of the school districts are properly understood to be the function of the board of education.

In this case the parties are even more distinct entities than in *Kugler*. There, as here, both parties were arms of the State. But in *Kugler*, both parties were involved in the enforcement of the law as well. And even though the prior prosecution in that case concluded with an acquittal, the court still found that it would not bar the latter proceeding. That court recognized the injustice which would result by permitting actions brought on behalf of the State under the Consumer Fraud Act to be barred by similar actions in municipal court. The same reasoning is applicable here. Although the board of education was involved in the hearing to reinstate the juvenile in school, its appearance cannot be found to adequately represent the State's prosecutorial interests. To allow the State to be bound in this case by the decision in the prior hearing would deny the State its opportunity to prosecute this juvenile and thereby carry out its mandate.

While there was a prior determination on the constitutionality of the search at issue here, the concepts of collateral estoppel, *res judicata* and double jeopardy do not dictate a bar to this proceeding. Consequently, the motion to dismiss is denied and the matter is to be listed for trial.

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L. STEVENS
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-VS-

T.L.O., a Juvenile,

Respondent.

JOINT APPENDIX

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF N.J.
BY: Allan J. Nodes
Deputy Attorney General
Richard J. Hughes Justice
Complex
Trenton, New Jersey 08625
(609) 984-4804

Counsel for Petitioner

JOSEPH H. RODRIGUEZ
PUBLIC DEFENDER
BY: Lois DeJulio
First Assistant Deputy
Public Defender
20 Evergreen Place
East Orange, New Jersey 07018
(201) 648-3280

Counsel for Respondent

PETITION FOR CERTIORARI FILED OCTOBER 7, 1983
CERTIORARI GRANTED NOVEMBER 28, 1983

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RELEVANT DATES OF IMPORTANCE

Juvenile and Domestic Relations Court, Middlesex County, New Jersey:

March 7, 1980 - Juvenile Delinquency Complaint No. JD 1322-80 filed in the matter of *State in the Interest of T.L.O.*

September 26, 1980 - Denial of Juvenile's motion to dismiss Complaint No. JD 1322-80 in the matter of *State in the Interest of T.L.O.*

March 23, 1981 - Trial held and Adjudication of Delinquency entered in *State in the Interest of T.L.O.*

January 8, 1982 - Sentencing of juvenile held in *State in the Interest of T.L.O.*

Superior Court of New Jersey, Appellate Division:

February 11, 1982 - Juvenile's Notice of Appeal filed in the matter of *State in the Interest of T.L.O.*

June 30, 1982 - Affirmance of adjudication of delinquency, with one judge dissenting.

Supreme Court of New Jersey:

July 16, 1982 - Juvenile's Notice of Appeal filed in the matter of *State in the Interest of T.L.O.*

August 8, 1983 - Reversal of judgment of Appellate Division in the matter of *State in the Interest of T.L.O.*

DECISION IN QUESTION

The State of New Jersey notes that all decisions in the New Jersey courts were both published and appear in the appendix to the petition for *certiorari* and are therefore not reprinted herein. Specifically, petitioner directs this Court's attention to:

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State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983). Opinion of the Supreme Court of New Jersey, decided August 8, 1983
.....Petition for Certiorari at 1a

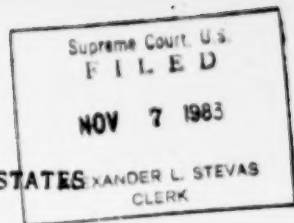
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State in the Interest of T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). Opinion of the Superior Court of New Jersey, Appellate Division, decided June 30, 1982
.....Petition for Certiorari at 22a

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State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980). Opinion of the Juvenile and Domestic Relations Court of Middlesex County, New Jersey, decided September 26, 1980
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No.

STATE OF NEW JERSEY,
Petitioner,

-v-

T.L.O.,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

LOIS DE JULIO
First Assistant Deputy Public Defender
Office of the Public Defender
20 Evergreen Place
East Orange, New Jersey 07018
(201) 648-3280
Counsel for Respondent

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No.

STATE OF NEW JERSEY,
Petitioner

-v-

T.L.O.,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of
New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, T.L.O., respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Supreme Court of New Jersey rendered in this case on August 8, 1983.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported as State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983). The decision of the Appellate Division of the Superior Court is published at 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). The opinion of the trial court is reported at 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

New Jersey Constitution of 1947, Article I, paragraph 7.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

New Jersey Constitution of 1947, Article VIII, section 4, paragraph 1.

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

N.J.S.A. 2A:4-60.

All defenses available to an adult charged with a crime, offense or violation shall be available to a juvenile charged with committing an act of delinquency . . . The right to be secure from unreasonable searches and seizures . . . shall be applicable in cases arising under this act as in cases of persons charged with crime.

N.J.S.A. 18A:25-2.

A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school . . .

N.J.S.A. 18A:37-1.

Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.

N.J.S.A. 18A:6-1

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary: (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intentment of this section...

N.J.S.A. 18A:37-2(j)

. . . Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include . . .

j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

STATEMENT OF THE CASE

On March 7, 1980, a search was made by Theodore Choplik, Vice Principal of Piscataway High School, of a purse belonging to T.L.O., then a student at the school. Ms. Lenore Chen, a mathematics instructor had made a routine check of the girls' restroom. She observed T.L.O. and another girl smoking tobacco cigarettes. (TS 20-7 to 25) Although smoking by students was permitted in certain designated areas, it was not allowed in the restrooms. (TS 33-20 to TS 34-6) Ms. Chen ordered both girls to accompany her to Mr. Choplik's office, where she advised him of the infraction. (TS 21-1 to TS 22-23).

Upon being questioned, T.L.O. denied that she smoked. (TS 27-1 to 21) Mr. Choplik then asked T.L.O. to give him her handbag because when "she said to me she wasn't smoking, all right, that was to me to see if there was any proof that she was . . . and so my intent was to see if there was cigarettes inside, which would be a sign to me that she was smoking." (TS 31-1 to 13) When T.L.O. complied, Mr. Choplik opened the purse and "there was a package of Marlboros sitting right on the top there." (TS 28-3 to 11) He removed the cigarettes, showed the package to T.L.O., and accused her of lying. (TS 28-12 to 18) As he reached in and removed the Marlboros, Mr. Choplik also observed cigarette rolling papers in the purse. He removed them, and asked T.L.O. "what she was doing with these." She denied that they were hers. (TS 28-21 to TS 29-5) Mr. Choplik explained that "from then on I went to see what else was in there because from my experiences that seems to be a sign that someone is smoking marijuana." (TS 29-7 to 9)

Looking further into the handbag, he found a metal pipe, some empty plastic bags, and one plastic bag containing tobacco or some similar substance.* (TS 29-10 to 16) He also found a

* At trial it was stipulated that the bag contained 5.40 grams of marijuana. (T 12-17 to 25)

wallet containing "a lot of singles and change," and inside a compartment in the bag, two letters and an index card. (TS 36-7 to 10; TS 38-6 to 12; TS 40-20 to 22; TS 39-4 to TS 40-11). Mr. Choplik then called T.L.O.'s mother, and the police. (TS 41-8 to 10)

Mr. Choplik admitted that he did not tell T.L.O. at any time that she had a right to refuse to open her pocketbook. Her purse was closed when she gave it to him and he acknowledged that he could not see into it until after he opened it. (TS 47-14 to 25) He also agreed that at the time Ms. Chen initially accused T.L.O. of smoking, he had a sufficient basis to impose a sanction without need for further evidence. (TS 47-9 to 13)

The local police were summoned, and T.L.O. was subsequently taken to headquarters, accompanied by her mother. Upon arrival, Officer O'Gurkins advised the juvenile of her Miranda rights. (T 20-7 to T 21-3) When Mrs. O. indicated that she wanted to have an attorney present during questioning, she was permitted to telephone the office of Mr. Simon. (T 34-10 to 25) He was not there, so the officer was allowed to proceed with the interrogation. According to Mrs. O., her daughter at no time stated that she had sold marijuana. (T 35-15 to 22)

Officer O'Gurkins admitted that although it was standard practice in juvenile matters to reduce incriminating statements to writing, he did not follow this procedure with T.L.O. (T 24-12 to 18) He nevertheless maintained that T.L.O. had confessed that she had been selling marijuana in school for a week, charging \$1.00 per "joint." (T 22-2 to 17) He conceded that T.L.O. explained to him that the \$40.98, in singles and change, which was found in her purse, constituted the proceeds plus "tips" from her Courier-News paper route, which she had collected the night before. Officer O'Gurkins did not,

however, include this exculpatory information in his incident report. (T 23-12 to 18)

As a result of this incident, Middlesex County Complaint Number JD-1322-80 was filed charging the juvenile with possession of marijuana with intent to distribute. In addition, T.L.O. was suspended from school for seven days for possession of marijuana within school premises, and three days for smoking cigarettes in an area of the school where smoking was not permitted. See State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980)

A civil proceeding was brought by the juvenile in the Superior Court, Chancery Division against the Piscataway School Board to compel her reinstatement in school. Testimony was taken before the Honorable David Furman, J.S.C. on March 31, 1980. Judge Furman ruled that the search of the pocketbook was illegal and that the evidence found as a result could not be used against her. Accordingly he vacated the seven day suspension based upon the marijuana offense. (TC 26-1 to TC 27-22) The juvenile returned to school.

On September 26, 1980, a motion was brought before the Honorable George J. Nicola, J.J.D.R.C. to dismiss Complaint Number JD-1322-80 on the grounds that Judge Furman's decision on the legality of the search precluded further litigation of the matter. This motion was denied, the suppression question was relitigated, and the search was found by the Juvenile Court to be legal. State in the Interest of T.L.O., supra, 178 N.J. Super. at 342-45.

After a trial held on March 23, 1981, T.L.O. was found guilty of possession of marijuana with intent to distribute. On January 8, 1982, a probationary term of one year was imposed on the juvenile.

By letter dated February 9, 1982, T.L.O. was formally advised that she was suspended from school pending a formal hearing to expel her. The expulsion proceedings would be based

upon her having been adjudicated a delinquent for possession on March 7, 1980 of marijuana with intent to distribute.

A Notice of Appeal from the adjudication of delinquency was filed with the Appellate Division on February 11, 1982.

On February 10, 1982, a Notice of Motion to stay the adjudications of delinquency and to compel the school board to allow the juvenile to attend school during the pendency of the appeal was filed with the Middlesex County Juvenile and Domestic Relations Court, and ultimately granted by the Appellate Division on February 25, 1982. The juvenile was thereupon allowed to return to school.

The appeal was decided on June 30, 1982. State in the Interest of T.L.O., 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982).

Judges Milmed and Gaulkin affirmed the denial of the motion to suppress the evidence secured by the search of the juvenile's purse, adopting the reasons set forth in the opinion of the trial court. However, they found that "neither the record nor the findings and conclusion of the trial judge are sufficient for us to determine the sufficiency of the Miranda waiver which was assertedly made by or on behalf of the juvenile immediately before her resumed questioning by the police officer." Id., at 448 A.2d 493. They therefore vacated the adjudication of delinquency and ordered a remand to the trial court "for further proceedings and findings and conclusions in light of the principles enunciated in Edwards v. Arizona, ___ U.S. ___, 68 L.Ed. 2d. 378 (1981) and State v. Fussell, 174 N.J. Super. 14 (App. Div. 1980)." Id.

Judge Joelson dissented, indicating that he would reverse the denial of the motion to suppress the evidence found in T.L.O.'s purse. Id. at 495.

A Notice of Appeal was filed with the New Jersey Supreme Court on July 16, 1982. Because the appeal was based upon the dissenting opinion, the only issue before the court was the legality of the search.

The companion case of State v. Engerud was certified directly to the Supreme Court, unheard in the Appellate Division. State v. Engerud, 93 N.J. 308, 460 A.2d 701 (1983) Argument was heard in both cases on May 10, 1983.

On August 8, 1983, the State Supreme Court rendered its judgment in both matters. Due to the death of defendant Jeffrey Engerud shortly thereafter, the prosecutor now petitions for a writ of certiorari only from the decision in State in the Interest of T.L.O.

REASONS FOR DENYING
THE WRIT

POINT 1

THE DECISION OF THE NEW JERSEY SUPREME
COURT WAS SUPPORTED BY INDEPENDENT AND
ADEQUATE STATE GROUNDS.

Because it lacks jurisdiction to render advisory opinions, this Court has historically and consistently refused to review decisions which rest upon adequate and independent state grounds. Michigan v. Long, ---U.S.---, 103 S. Ct. 3469, 3475-76 (1983); Fox Film Corporation v. Muller, 296 U.S. 207, 210, 56 S.Ct. 183, 80 L.Ed. 158 (1935). Respondent submits that the opinion of the New Jersey Supreme Court in State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983) is based upon such grounds, and that accordingly, the State's petition for a writ of certiorari should be denied.

It has long been settled that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, the jurisdiction of the United States Supreme Court fails if the nonfederal ground is independent of the federal, and is adequate to support the judgment. Fox Film Corporation v. Muller, supra, 56 S.Ct. at 184; Klinger v. Missouri, 13 Wall. 257, 263, 20 L.Ed. 635 (1872) The basis for this rule was set forth at length in Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S.Ct. 459, 89 L.Ed. 789 (1945):

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

The decision as to whether an asserted non-federal ground independently and adequately supports a judgment is the

prerogative of this Court. Olive State Bank v. Bryan, 282 U.S. 765, 773, 51 S.Ct. 252, 75 L.Ed. 690 (1931). Moreover, as is clear from the recently decided Michigan v. Long, supra, the sufficiency and the independence of the state ground must be apparent from the "four corners of the opinion." Id., 103 S.Ct. at 3475.

In the instant matter, a review of the opinion below leads inescapably to the conclusion that the outcome rests upon sufficient state grounds, independent of and unaffected by federal constitutional considerations. First, it is clear that the decision below rests substantially on a local law which has no counterpart in the Federal Constitution. As the petitioner has correctly noted, this Court has never expressly decided the question of whether and to what extent juveniles are entitled to be free of unreasonable searches and seizures as set forth in the Fourth Amendment. In the New Jersey Code of Juvenile Justice, however, the Legislature has enacted a provision which guarantees to juveniles the same right to be secure from unreasonable searches and seizures as would be accorded to adults. N.J.S.A. 2A:4-60. This provision was expressly relied upon by the New Jersey Supreme Court. See State in the Interest of T.L.O., supra, 463 A.2d at 939, n. 5. Thus, should this Court decide that the Fourth Amendment applies only to adults, or that as petitioner urges, its protections apply to juveniles only in some attenuated form this aspect of the New Jersey Court's decision would remain unaffected; the New Jersey Court would still be required by the local statute to give juveniles parity with adults in this respect.

In addition, the T.L.O. decision is explicitly founded upon state constitutional grounds which accord New Jersey citizens rights and protections beyond that afforded by the Federal Constitution. At the very outset, the New Jersey Supreme Court noted that, "Young people and students are persons by the

United States and New Jersey Constitutions." (Emphasis supplied) State in the Interest of T.L.O., supra, at 938. Thus the court clearly signalled that the decision would have its roots in state as well as federal constitutional principles. In support of this proposition, the New Jersey Court compared N.J.S.A. 19A:6-1, which bans corporal punishment in New Jersey schools, with Ingraham v. Wright, 430 U.S. 651, 51 L.Ed.2d 711 (1977), in which reasonable corporal punishment of students is found not to violate the Eighth Amendment of the Federal Constitution. State in the Interest of T.L.O., supra at 938. The clear import of this comparison is to demonstrate that under New Jersey law, young people and students can be given greater protections than would be mandated by the Federal Constitution.

The court went on to state as one basis for its decision "the obligation of school officials to furnish a thorough and efficient education," (State in the Interest of T.L.O., supra, at 943), a clear reference to Article VIII, section 4, paragraph 1, of the New Jersey Constitution (1947).*

This constitutional provision guarantees to New Jersey children between the ages of five and eighteen certain educational rights; it has no counterpart in the Federal Constitution. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), cert. den. sub nom Dickey v. Robinson, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973). See also State v. Hunt, 91 N.J. 338, 450 A.2d 952, 955 (1982). Moreover, the New Jersey Supreme Court does not merely pay lip service to this constitutional provision (as was the case in Michigan v. Long, supra, at 3477), but in the opinion evaluates the entire

* Article VIII, section 4, paragraph 1 states:

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children of the state between the ages of five and eighteen years.

legislative scheme enacted to implement a thorough and efficient education before deciding the extent to which school students can be subjected to a search:

The Legislature has specifically charged school officials to maintain order, safety and discipline. The statutes give them authority to prevent disorderly conduct by pupils, N.J.S.A. 18A:25-2, and students are required to submit to such authority, N.J.S.A. 18A:37-1. Specifically, school officials have power to suspend pupils for illegal possession or consumption of drugs and alcohol, N.J.S.A. 18A:37-2(j), for assaulting teachers, N.J.S.A. 18A:37-2.1, or for other good cause. See N.J.S.A. 18A:37-2, -4. Other statutes allow them to deal specifically with pupils who are under the influence of drugs or alcohol, N.J.S.A. 18A:40-4.1 (principal should notify parent); N.J.S.A. 18A:35-4a (board of education shall establish policies and procedures for evaluating and treating alcohol users). Finally, N.J.S.A. 18A:6-1 grants specific power to seize weapons or other dangerous items and to quell disturbances.

Taken together, these statutes yield the proposition that school officials, within the school setting, have the authority to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. State in the Interest of T.L.O., supra at 940.

* * *

We are satisfied that the Legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes. Id.

Since the educational guarantees of Article VIII, section 4, paragraph 1 have no corollary in the Federal Constitution, the New Jersey Court's reliance upon this ground is surely independent of any federal constitutional considerations. Moreover, in construing the constitutional mandate of a "thorough and efficient" education and its statutory implements, the New Jersey Court has a wholly sufficient basis to rule that school children can not be harassed by official searches except under certain narrowly limited circumstances.

Additionally, the T.L.O. decision is also rooted in Article

I, paragraph 7 of the New Jersey Constitution (1947).*

Although this provision is similar in wording to the Fourth Amendment, it has been repeatedly and specifically construed to guarantee more expansive protections. See e.g. State v. Alston, 88 N.J. 211, 440 A.2d 1311, 1319 (1981) (finding that under the State Constitution a person's ownership of or possessory interest in property confers standing for search and seizure purposes, despite the Rakas line of federal decisions); State v. Johnson, 68 N.J. 349, 346 A.2d 66, 67-68 (1975) (holding that under the State Constitution, if the prosecution wants to assert that a search was made pursuant to consent, the state has the burden of showing that defendant knew he could refuse); State v. Hunt, supra (requiring that under the State Constitution a warrant must be obtained to secure an individual's billing records from the telephone company, despite the decision in Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) that a telephone user has no Fourth Amendment expectation of privacy in phone company records.)

In deciding that a school official need not apply for a warrant, the New Jersey court did quote from Mincy v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 51 L.Ed.2d 290 (1978), to the effect that a few narrow exceptions exist to the general rule requiring warrants. Id. at 939. However, two New Jersey cases were also cited in support of this proposition: State v. Patino and State v. Bruzzese. State in the Interest of T.L.O., supra. Both of these cases specifically rely upon Article I, paragraph 7 of the State Constitution. See State v. Patino, 83

* This provision reads as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particulars describing the place to be searched and the papers and things to be seized.

N.J. 1, 7 414 A.2d 1327, 1330 (1980); State v. Bruzzese, 94 N.J. 210, 463 A.2d 320, 323 (1983). In concluding that a warrant is not necessary because the school setting is akin to the "pervasively regulated business", the court again refers to federal cases, but it also relies upon In re Martin, 90 N.J. 295, 447 A.2d 1290, 1297 (1982), State v. Dolce, 178 N.J. Super. 275, 283, 428 A.2d 947, 952 (App. Div. 1981), and State v. Williams, 84 N.J. 217, 225, 417 A.2d 1046, 1050 (1980), cases based in part upon state constitutional or statutory grounds. State in the Interest of T.L.O., supra at 939-40.

With regard to the standard by which the legality of school searches must be evaluated, the New Jersey Court reviewed cases from both federal and other state jurisdictions, before choosing to adopt the "reasonable grounds to believe" standard espoused by the majority of cases. State in the Interest of T.L.O., supra at 940-41. While the New Jersey Court refers to several Fourth Amendment decisions, it also relies on In re Martin, supra, a case involving the question of the reasonableness of an administrative search of gambling casinos, decided pursuant to both the Federal and State Constitutions. State in the Interest of T.L.O., supra at 941. Similarly, in determining whether an exclusionary rule should be applied in the context of a search by an official other than a police officer, the New Jersey Court looked to the long-settled principles exemplified by such federal cases as See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); and Michigan v. Tyler, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), before answering in the affirmative. State in the Interest of T.L.O., supra at 939. This conclusion was, however, also specifically premised upon the New Jersey Code of Juvenile Justice. Id. at 939, n. 5.

Thus at each step of its legal analysis, the New Jersey

Court relied upon state as well as federal decisions.* Moreover, the mere presence of federal precedents in a state court opinion does not, in itself, compel the conclusion that the judgment was based upon federal grounds. A state court may choose to rely upon federal caselaw for guidance, in the same way that it might find opinions from the courts of sister states to be persuasive. Michigan v. Long, supra; Zacchini v. Scripps-Howard Broadcasting Co., 443 U.S. 562, 568, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). Only if it appears that the state court felt bound and compelled by the constitutional considerations expressed in the federal decisions, and altered the application of its own law accordingly is the independence of the asserted state ground undermined. Id. While the New Jersey Supreme did utilize federal caselaw for guidance and reference, at no time in the opinion below did it express the view that it was bound by such precedents in construing its own law. Thus, it is clear from "the four corners of the opinion" that the decision is based upon adequate state grounds, and that this Court would be rendering an advisory opinion should a writ of certiorari be granted.

Moreover, contrary to the situation in Michigan v. Long, supra at 3478, n. 10, should this Court look to New Jersey case law beyond the scope of the T.L.O. opinion, it would be found that the Supreme Court of New Jersey has often construed the State Constitution to require greater rights and protections than have been held by this Court to be required by federal constitutional principles. See e.g. State v. Schmid, 84 N.J. 535, 423 A.2d 15 (1980) (ruling that the New Jersey "free speech" clause is more expansive than the First Amendment);

* By contrast, one of the reasons stated in Michigan v. Long, supra for concluding that the decision did not rest upon independent state grounds was the fact that the Michigan Supreme Court did not cite "a single state case" in support. Id. at 3477.

State v. Bellucci, 81 N.J. 531, 310 A.2d 666 (1979) (giving the state constitutional right to effective assistance of counsel more expansive protection than found in the Federal Constitution.) Thus, even a cursory review of New Jersey case law reveals an extensive and bona fide pattern of reliance upon the State Constitution for greater protections than mandated by federal law.

For these reasons, respondent maintains that the decision below is based upon adequate and independent state grounds.

POINT II

THE DECISION OF THE NEW JERSEY SUPREME COURT WAS IN ACCORDANCE WITH FEDERAL CONSTITUTIONAL LAW.

Petitioner contends that a writ of certiorari should issue because the New Jersey Supreme Court erroneously concluded that the Fourth Amendment exclusionary rule applies to evidence obtained as a result of the search of a student by a school administrator. As discussed at length in Point I, supra, respondent maintains that the decision below is based upon independent and adequate state grounds. However even assuming, arguendo, that such were not the case, it is clear that the opinion in State in the Interest of T.L.O., supra, is entirely in accordance with federal constitutional principles. Respondent therefore maintains that since the matter was correctly decided by the New Jersey Supreme Court, the State's petition for a writ of certiorari should be denied.

The petitioner specifically argues that evidence obtained as a result of a school search should not be suppressed because this Court's "Fourth Amendment exclusionary rule mandates have related exclusively to searches conducted by police officials." (Petition for Certiorari at 5) This contention is patently erroneous. It has long been settled that the Fourth Amendment gives protection against unlawful searches and seizures, and that this protection applies not merely against the police, but against any action by governmental agencies. Burdeau v. McDowell, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

As this Court more recently stated in Michigan v. Tyler. 436 U.S. 499, 504-05, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978),

The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in Camara v. Municipal Court, 387 U.S. 523, 528, 18 L.Ed.2d 930, 87 S.Ct. 1727, the "basic purpose of this Amendment . . . is to

safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. See v. Seattle, 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737, Marshall v. Barlow's Inc., ante at 311-313, 56 L.Ed.2d 305, 98 S.Ct. 1816. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

Thus, the protections of the Fourth Amendment exclusionary rule have been specifically held to apply to such non-police governmental officials as building inspectors (Camara v. Municipal Court, *supra*), firemen (Michigan v. Tyler, *supra*), occupational safety inspectors (Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978)).

Indeed the decision in Burdeau v. McDowell, *supra*, mistakenly relied upon by the petitioner in support of this argument, at no time limits itself to law enforcement officers; the Court refers to searches by "governmental agencies," "official(s) of the federal government," and "sovereign authority." Id. at 475. The search held to be outside the ambit of the Fourth Amendment in that matter was conducted by the defendant's employer, i.e. a private citizen. Id.

This Court has on numerous occasions found teachers and school administrators to be governmental agents for constitutional purposes. See e.g. Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Tinker v. Des Moines, etc. School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 7231 (1969); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

As this Court held in Barnette, *supra*, at 63 S.Ct. 1185:

"The Fourteenth Amendment, as now applied to the states, protects the

citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

Similarly, in Tinker, supra, at 89 S.Ct. 739, this Court ruled:

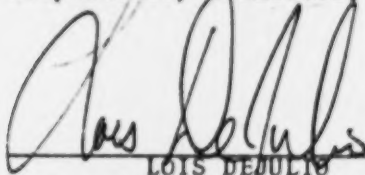
"In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

Thus, the decisions of this Court compel the conclusion that school administrators are governmental officials rather than private citizens for federal constitutional purposes. The New Jersey Supreme Court's ruling suppressing evidence discovered as a result of an illegal search by a high school principal was entirely in accord with Fourth Amendment considerations.

CONCLUSION

For these reasons, it is respectfully urged that the
Petition for a Writ of Certiorari be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Lois DeJulio", is written over a horizontal line.

LOIS DEJULIO

First Assistant Deputy Public Defender
Office of the Public Defender
Appellate Section
20 Evergreen Place
East Orange, New Jersey 07018

Of Counsel and on the Petition

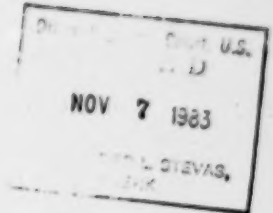
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. 83-712



THE STATE OF NEW JERSEY, Petitioner,

v.

T.L.O., Respondent.

The Respondent, T.L.O., asks leave to file the attached Brief in Opposition to a Petition for a writ of Certiorari to the Superior Court of New Jersey, Appellate Division without prepayment of costs, and to proceed in forma pauperis pursuant to Rule 46.

The Respondent's affidavit in support of this motion is attached hereto.

A handwritten signature in cursive script, appearing to read "Lois De Julio".

LOIS DE JULIO, First Assistant
Deputy Public Defender
COUNSEL FOR RESPONDENT

OFFICE OF THE PUBLIC DEFENDER
(Appellate Section)
20 Evergreen Place
East Orange, New Jersey 07018
(201) 648-3280

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

No. _____

THE STATE OF NEW JERSEY, Petitioner,

v.

T.L.O., Respondent.

AFFIDAVIT

I, Terry L. Owens, of full age, being duly sworn according to law, depose and say in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the Respondent in the above-entitled case.
2. Although I was a juvenile at the commencement of this matter, I became eighteen years of age on April 24, 1983.
3. Because of my poverty, I am unable to pay the costs of said cause.
4. I am unable to give security for the same.
5. I believe that I am entitled to the redress I seek in said case.
6. I graduated from high school in June of 1983. Although I am actively seeking work, I am not presently employed.
7. Over the past twelve months, I have earned \$990. from part-time employment while attending school.
8. I do not own any cash or checking or savings accounts.

9. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

10. I was represented on appeal in the New Jersey Courts by the Office of the Public Defender. I qualified as being an indigent person under their standards.

11. I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Terry Owens
TERRY L. OWENS

Sworn and subscribed to
before me on this 1st
day of NOVEMBER, 1983

John Sene
My Commission Expires 11-7-85

No. 83-712

Office - Supreme Court, U.S.

FILED

JAN 16 1984

ALEXANDER L. STEVENS
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-VS-

T.L.O., a Juvenile,

Respondent.

**ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY**

BRIEF FOR PETITIONER

IRWIN I. KIMMELMAN

Attorney General of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
(609) 984-4804

Attorney for Petitioner,
State of New Jersey

On the Brief

ALLAN J. NODES

VICTORIA CURTIS BRAMSON

Deputy Attorneys General

Division of Criminal Justice

QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school.

PARTIES TO THE PROCEEDING BELOW

In addition to the captioned parties, the parties before the New Jersey Supreme Court included Jeffrey Engerud, a defendant now deceased, and, as *amici curiae*, the New Jersey School Boards Association and the American Civil Liberties Union of New Jersey.

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No. 83-712

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF NEW JERSEY,

Petitioner,

vs.

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF FOR PETITIONER

OPINIONS BELOW

State in the Interest of T.L.O., 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd*, 94 N.J. 331, 463 A.2d 934 (1983).

JURISDICTION

The judgment of the New Jersey Supreme Court which is at issue in this matter was entered on August 8, 1983, and a petition for *certiorari* was timely filed on October 7, 1983. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(3), with *certiorari* to the Supreme Court of New Jersey having been granted on November 28, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.J. Stat. Ann. 24:21-19 (West 1940 & Supp. 1983). Prohibited Acts

A. Manufacturing, distributing, or dispensing - Penalties

a. Except as authorized by this act, it shall be unlawful for any person knowingly or intentionally:

- (1) To manufacture, distribute, or dispense, or to possess or have under his control with intent to manufacture, distribute, or dispense, a controlled dangerous substance; . . .

N.J. Stat. Ann. 24:21-20 (West 1940 & Supp. 1983). Prohibited Acts

B. Possession, use or being under influence - Penalties

a. It is unlawful for any person, knowingly or intentionally, to obtain, or to possess, actually or constructively, a controlled dangerous substance unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this act. Any person who violates this section with respect to: . . .

- (4) Possession of more than 25 grams of marijuana, including any adulterants or dilutants, or more than 5 grams of hashish is guilty of a high misdemeanor and shall be punished by imprisonment for not more than 5 years, a fine of not more than \$15,000.00 or both; provided, however, that any person who violates this section with respect to 25 grams or less of marijuana, including any adulterants or dilutants, or 5 grams or less of hashish is a disorderly person.

STATEMENT OF THE CASE

On the morning of March 7, 1980, a teacher of mathematics at Piscataway High School entered the girls restroom and found the juvenile-respondent T.L.O. and a girl named Johnson holding what the teacher perceived to be lit cigarettes. (MT20-1 to 25).¹ Smoking was not permitted and the girls were thus committing an infraction of the school rules. The girls were taken to the principal's office where they met with Theodore Choplick, the assistant vice-principal. (MT21-1 to 3; MT21-24 to 22-11; MT31-18 to 20; MT33-20 to 34-10).

Mr. Choplick asked the two girls whether they were smoking. Miss Johnson acknowledged that she had been smoking, and Mr. Choplick imposed three days attendance at a smoking clinic as punishment. (T49-24 to 50-7). T.L.O. denied smoking in the lavatory and further asserted that she did not smoke at all. (MT27-10 to 17). Mr. Choplick asked T.L.O. to come into a private office. (MT27-14 to 21; MT30-22 to 31-17).

Once inside this office, Mr. Choplick requested the juvenile's purse, and she gave it to him. (MT27-24 to 28-7). A package of Marlboro cigarettes was visible inside the purse. (MT28-9 to 11). Mr. Choplick held up the Marlboros and said to the juvenile, "You lied to me." (MT28-14 to 18). In plain view next to the Marlboros was a package of "Easy Roll" rolling papers for cigarettes. (MT28-19 to 24; T16-12 to 14). Upon being confronted with the rolling papers, the juvenile denied that they belonged to her. (MT29-5 to 24).

On the basis of his experience, Mr. Choplick understood possession of rolling papers to indicate that a person is smoking marijuana and looked further into the purse. There he found marijuana, drug paraphernalia, \$40 in one-dollar bills and documentation of T.L.O.'s sale of marijuana to other students. (MT29-7 to 9; T15-18 to 16-1; T41-5 to 13). Mr. Choplick called T.L.O.'s mother and then notified the police. (MT41-5 to 13).

1 "MT" refers to the transcript of the motion to suppress heard before the Juvenile and Domestic Relations Court on September 26, 1980;

"T" refers to the transcript of trial on March 23, 1981, the transcript of the juvenile's plea of guilty to other complaints on June 2, 1981, and the transcript of sentencing on January 8, 1982, all contained in one volume.

T.L.O.'s mother acceded to a police request to bring her daughter to police headquarters for questioning. (T18-12 to 18). Once at headquarters, T.L.O. was advised of her rights in her mother's presence and signed a *Miranda*² rights card so indicating. (T20-3 to 21). The officer then began to question T.L.O. in her mother's presence. (T23-4 to 6). T.L.O. admitted that the objects found in her purse belonged to her. She further admitted that she was selling marijuana in school, receiving \$1 per "joint," or rolled marijuana cigarette. T.L.O. stated that she sold between 18 and 20 joints at school that very morning, before the drug was confiscated by the assistant vice-principal. (T22-2 to 15). A delinquency complaint charging the juvenile with possession of marijuana with the intent to distribute, contrary to *N.J. Stat. Ann. 24:21-19(a)(1)* (West 1940 & Supp. 1983) and *N.J. Stat. Ann. 24:21-20(a)(4)* (West 1940 & Supp. 1983), was then drafted and filed the same day. Because the offense occurred on school property, the school, in accordance with its published procedures, administratively suspended the juvenile for ten days.

On September 26, 1980, the trial court considered and denied the juvenile's motion to suppress evidence. *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 336-343, 428 A.2d 1327, 1330-1334 (J.D.R.C. 1980), *aff'd o.b. in part and rev'd o.g. in part*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982), *rev'd* 94 N.J. 331, 463 A.2d 934 (1983). On March 23, 1981, the juvenile was tried and, at the conclusion of trial, she was found guilty and adjudicated delinquent. (T69-6 to 8). On January 8, 1982, T.L.O. was sentenced to probation for one year with the special condition that she observe a reasonable curfew, attend school regularly and successfully complete a counselling and drug therapy program.

On February 11, 1982, the juvenile filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. On June 30, 1982, the Appellate Division, with one judge dissenting, affirmed the denial of the motion to suppress evidence seized in the search of the juvenile's purse, for the reasons expressed in the trial court's reported opinion. 185 N.J. Super. 279, 448 A.2d 493.

On July 16, 1982, the juvenile filed a Notice of Appeal to the Supreme Court of New Jersey. On August 8, 1983, the State Supreme

2 *Miranda v. Arizona*, 384 U.S. 436 (1966).

Court held that the Fourth Amendment exclusionary rule applies to searches and seizures conducted by school officials of students in public schools. 94 N.J. 331, 463 A.2d 934.

In that same opinion, the New Jersey Supreme Court applied the same principle in the companion case of *State v. Engerud*, involving a search of a high school student's locker pursuant to information that the student was selling controlled dangerous substances in the school. Shortly after the date of the decision, the defendant Engerud was killed in a motorcycle accident, thus mooted any petition in that case.

SUMMARY OF ARGUMENT

The exclusionary rule should not be applied to a search of a student or his or her belongings by a public school official in the pursuit of a school disciplinary objective. Because a school official's main concern is education, he is not primarily interested in whether a conviction is later obtained as a result of his disciplinary activities. He conducts searches too infrequently to adapt his methods to highly technical rules and, therefore, application of the exclusionary rule would have no rational bearing on deterring any improper searches by such official. Any incremental deterrent effect on the school official of suppression in a later criminal proceeding would be far outweighed by the detrimental effect upon society occasioned by the suppression of probative evidence of criminality in the school system. Indeed, assuming *arguendo* that exclusion of evidence could deter unreasonable searches by school officials, application of the exclusionary rule would exact too great a societal cost by impairing the school authorities' capability of enforcing school discipline.

LEGAL ARGUMENT

THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO SEARCHES CONDUCTED BY PUBLIC SCHOOL OFFICIALS IN SCHOOL.

This case comes before the Court as a result of a school official opening a schoolgirl's purse and finding marijuana, drug paraphernalia, cash and other evidence documenting the girl's sale of drugs to her classmates. The evidence was turned over to police and thereafter used in a juvenile delinquency proceeding. While the trial court and intermediate state appellate court found the search of the purse to be reasonable, the Supreme Court of New Jersey ruled the search unreasonable under the Fourth Amendment and, applying the exclusionary rule, suppressed the evidence obtained in the search. Petitioner, the State of New Jersey, urges this Court to hold that the exclusionary rule is inapplicable to exclude evidence discovered in searches conducted by public school officials in school pursuant to their obligation to maintain school discipline.

While the Fourth Amendment proscribes unreasonable searches conducted by government agents, the exclusionary rule is not coextensive with violations of that amendment and is designed to reach only actions by law enforcement officials. Indeed, application of the exclusionary rule has never been sanctioned by this Court in any context other than as a remedy against unconstitutional searches and seizures by law enforcement officers. The first step in any analysis is to recognize this distinction between the Fourth Amendment and the associated exclusionary rule. The Fourth Amendment proscribes all unreasonable searches conducted by government agents; operation of the exclusionary rule as a remedy for Fourth Amendment violations is limited to those unreasonable searches conducted by law enforcement officers.

Logic, public policy and the history of the Fourth Amendment exclusionary rule all militate against application of this sanction against

those who, like school authorities, are not directly involved in law enforcement.³ The purpose of the exclusionary rule is to deter unlawful conduct on the part of law enforcement authorities by not allowing those involved in law enforcement to benefit from the fruits of such conduct. For those officials, such as school personnel, who are not involved in law enforcement nor charged with that responsibility, however, the exclusion from a criminal proceeding of evidence will have little meaning. Thus, the exclusionary rule can have little or no deterrent impact upon their actions. A brief review of the development of the Fourth Amendment exclusionary rule will clearly demonstrate that the purpose of the rule is the deterrence of unlawful conduct and that the rule is intended to be invoked solely against law enforcement officials.

This Court first considered application of an exclusionary rule to remedy Fourth Amendment violations in *Adams v. New York*, 192 U.S. 585 (1904).⁴ In *Adams*, federal law enforcement officers unlawfully seized papers of the defendant which documented his participation in illegal lotteries. *Id.* at 587-589. The defendant objected to the introduction of this evidence at his trial on the basis that the officers had exceeded the scope of the warrant. *Id.* at 587. This Court noted that the Fourth Amendment was intended to prevent violations of citizens' privacy "by officers of the law" and to remedy such violations, *id.* at 598, and opined that law enforcement officers conducting an illegal search "would be responsible for the wrong done." *Id.* at 595. The Court then ruled that, regardless of the constitutionality of the underlying search, the evidence seized was legally competent under the rules of evidence and its admission was therefore justified. *Id.* at 595-596.

3 It could be argued that the Fourth Amendment itself is inapplicable to school authorities. This precise holding has been reached by some states. See *In re Donaldson*, 269 Cal.App.2d 509, 75 Cal.Rptr. 220 (Ct. App. 1969); *People v. Stewart*, 63 Misc.2d 601, 313 N.Y.S.2d 253 (N.Y. Crim. Ct. 1970); *Commonwealth v. Dingfelt*, 227 Super. 380, 323 A.2d 145 (Pa. Super. Ct. 1974); *Mercer v. State*, 450 S.W.2d 715 (Tex. Ct. Civ. App. 1970).

4 Previously, in a quasi-criminal tax forfeiture case, the Court had prohibited the government from compelling a defendant to produce documentary evidence necessary for proof of the government's case, but had justified that suppression under the Fifth Amendment's privilege against self-incrimination. *Boyd v. United States*, 116 U.S. 616 (1886).

In the case of *Weeks v. United States*, 232 U.S. 383 (1914), this Court formulated the precursor to the present exclusionary rule. In *Weeks*, as in its predecessor *Adams*, the Court was confronted with a Fourth Amendment violation by federal law enforcement officers. The *Weeks* Court admonished that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions" would not be tolerated. Thus, this Court ruled that, because inculpatory personal papers had been confiscated in violation of defendant's Fourth Amendment rights, the papers should have been returned to defendant on his motion prior to trial, and not used as evidence at trial. *Id.* at 398. The sanctions required by *Weeks* were obviously intended for purposes of deterrence and were directed solely to the conduct of federal law enforcement authorities who had violated the Fourth Amendment in their attempts to obtain material for use in criminal prosecutions.

This reasoning, that limitations on the use of unconstitutionally seized evidence could deter law enforcement officers from violating the Fourth Amendment, was further developed in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). In that case, Department of Justice officials and the United States marshal obtained corporate records using a method which was conceded by all parties to be in violation of the United States Constitution. Upon defendant's demand and the trial court's order, the government returned the original documents it had seized, but retained copies. The government then used the knowledge obtained from the illegal seizure to subpoena the original documents. *Id.* at 390-391. This Court ruled that law enforcement authorities could make no use of the unconstitutionally seized evidence or the knowledge gained from the unconstitutional seizure of evidence. *Id.* at 392.

The following year, this Court ruled that in certain circumstances a defendant could assert a violation of his Fourth Amendment rights and move for the return of property during, rather than only before, a criminal trial. *Amos v. United States*, 255 U.S. 313 (1921); *Gouled v. United States*, 255 U.S. 298 (1921). Shortly thereafter, when faced with a case in which the defendant could not move for the return of property without incriminating himself, this Court decided that illegally seized contraband could be suppressed even absent a motion for return of the property. *Agnello v. United States*, 269 U.S. 20, 34 (1925). It was still clear, however, that the exclusionary

rule was intended only to deter abuses by federal law enforcement authorities. *Byars v. United States*, 273 U.S. 28 (1927). Although the rule was later expanded to prohibit the federal use of evidence illegally seized by state authorities and turned over to federal authorities, *Elkins v. United States*, 364 U.S. 206, 222-224 (1960); see *Benanti v. United States*, 355 U.S. 96, 102 (1957); *Lustig v. United States*, 338 U.S. 74, 79 (1949), and thereafter extended *in toto* to the states, *Mapp v. Ohio*, 367 U.S. 643 (1961), the primary focus of the rule has remained the deterrence of unconstitutional searches performed by law enforcement officials.

Admittedly, this Court has recognized, at various times, "the imperative of judicial integrity" as a second possible justification for the exclusionary rule. Under that rationale, the judiciary would become "accomplices" in illegality by admitting evidence derived from the unconstitutional actions of law enforcement officers. *Lee v. Florida*, 392 U.S. 378, 385-386 (1968); *McNabb v. United States*, 318 U.S. 332, 345 (1943). Indeed, in *Elkins v. United States*, *supra*, the Court seemed to rely equally on deterrence and judicial integrity. Nevertheless, despite these temporary diversions, the single enduring reason for the existence of the exclusionary rule has been the deterrence of illegal searches by law enforcement officers.⁵ Therefore, in *Mapp v. Ohio*, *supra*, this Court, in requiring the states to apply the Fourth Amendment exclusionary rule, noted that the government must teach obedience to law by its own example, but placed primary emphasis on the deterrent effect of the rule. 367 U.S. at 655-656, 659. The scope to be afforded the imperative of judicial integrity was seemingly limited in *United States v. Peltier*, 422 U.S. 531 (1975), in which the Court held that the imperative was not offended by use of evidence derived from the good faith actions of law enforcement officers, even if the officers were later deemed to have

5 On occasion, this Court has observed that the exclusionary rule serves an educational purpose because it encourages law enforcement officers to learn to limit searches and seizures to those constitutionally permissible. See *Elkins v. United States*, 364 U.S. at 220-222. This purpose is, however, interconnected with the deterrent purpose of the rule. Indeed, it has been suggested that, if a jurisdiction developed a system of educating law enforcement agents coupled with an administrative system of disciplining those individuals or agencies failing to comply with the mandates of the Federal Constitution, a rule which requires invariable exclusion of illegally seized evidence would have no purpose. Goodparten, "An Essay on Ending the Exclusionary Rule," 33 *Hastings L.J.* 1065, 1107-1108 (1982).

acted unconstitutionally. *Id.* at 536-538. Finally, the vitality of this doctrine was seriously eroded by *Stone v. Powell*, 428 U.S. 465 (1976), where this Court stated:

While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.... The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights. [*Id.* at 485-486].⁶

One cannot fail to note the irony in justifying the suppression of evidence in order to achieve judicial integrity. Indeed, when illegally seized evidence is suppressed, it is recognized that the integrity of the truth-finding process itself is thereby impaired. See *United States v. Havens*, 446 U.S. 620, 626 (1980).

It is thus clear that the historic reason for the exclusionary rule was the deterrence of unlawful searches and seizures by law enforcement authorities. This theme has been stressed repeatedly, and although other justifications for the rule have been advanced, all but deterrence have been discarded. In this regard, it is indeed worthy of note that this Court has never held that illegal searches by private individuals come within the ambit of the rule. *Burdeau v. McDowell*, 256 U.S. 465 (1921); see *Walter v. United States*, 447 U.S. 649 (1980). Moreover, in those few instances where searches by persons such as officers of administrative agencies have been held subject to the rule, it has been clear that these agents were involved primarily in a public safety function which required their acting to enforce laws and regulations having consequences which were, at the least, quasi-criminal. See, e.g., *Michigan v. Tyler*, 436 U.S. 499 (1978) (search of fire-damaged premises by police or fire officials to investigate cause of fire); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (searches of work areas by Occupational Safety and Health Administration investigators); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (warrantless search of premises by investigators for San Francisco Department of Public Health).

⁶ It should also be noted that Justice Stewart, one of the strongest advocates of the imperative of judicial integrity, has recently written that it was never his intention to imply that this doctrine provided a constitutional basis for the rule. Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases," 83 *Colum. L. Rev.* 1365, 1382 n.2 (1983).

Additionally, this Court recently, in *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579 (1982), again emphasized that the purpose of the rule is to deter illegal police conduct. *Id.* at _____, 102 S.Ct. at 2592-2594. Indeed, both the majority and those Justices who dissented agreed that the rule was understood to act "as a deterrent to unconstitutional police conduct." *Id.* at _____, 102 S.Ct. at 2595; see *id.* at _____, 102 S.Ct. at 2593-2594. It has thus remained unmistakably clear that exclusion of unlawfully seized evidence has been and continues to be required only if the exclusion would serve to deter unlawful conduct by law enforcement officers. We strongly urge that it is against this standard that searches by school teachers and administrators must be measured.

In evaluating the need for a deterrent sanction, it is first necessary to identify those who are to be deterred. The instant matter concerns a search undertaken by school officials for a purely disciplinary purpose in which evidence of criminality was uncovered. The question is whether such evidence may be admitted in a subsequent criminal proceeding. It must be remembered that such school officials are not charged with enforcement of the criminal law. Rather, they seek to educate children and, in so doing, strive only to maintain an institutional environment conducive to such instruction. In their pursuit of this goal, school authorities may indeed uncover evidence of crime, but consideration of whether such evidence can or cannot be used by a different authority in a wholly different context "falls outside the offending [school official's] zone of primary interest." See *United States v. Janis*, 428 U.S. 433, 458 (1976) (evidence obtained by a state criminal law enforcement officer in good faith reliance on a warrant which later proved to be defective, while inadmissible in the state court, is admissible in a federal civil tax proceeding). Under such circumstances, the suppression of the evidence in a subsequent criminal trial would not "provide significant, much less substantial, additional deterrence," *id.*; application of the exclusionary rule to searches performed by school officials is, therefore, wholly unjustified.

It cannot be emphasized too strongly that the obligation of school administrators is not to enforce the criminal law, but to provide quality education to all children. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973). When, under a system

7 It is noted that the dissent also referred to the traditional value of judicial integrity as noted in *United States v. Pehter*, 442 U.S. 531.

of compulsory public education, parents must entrust their children to the public schools, parents have a right to expect that the schools will, to the best of their ability, protect the students and insulate them from harmful influences while pursuing the school's primary mission of educating them. While education remains the primary concern of school authorities, when the state assembles large numbers of young people in schools, it incurs a duty to protect them from being harmed. This duty of the school authorities to maintain "a proper educational environment," 3 W. LaFave, *Search and Seizure* § 10.11 at 458 (1978), carries with it a concomitant right of the students to pursue educational endeavors without exposure to danger or undue disruption.

It is, of course, painfully obvious that educators cannot properly discharge their duty to educate students if they are forced to function in an environment in which drugs and weapons play a major part.⁸ When drugs and weapons are commonplace in the school environment, the inevitable result is a crippling of our educational system. Because protecting students is directly related to the educational process, it is essential that school administrators have broad supervisory and disciplinary powers. Indeed, as this Court has recognized, children in attendance at public schools occupy a different constitutional position from that enjoyed by adult citizens. For, while adults have an absolute right to security from physical menaces or assaults, "the State itself may impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Ingraham v. Wright*, 430 U.S. 651, 661-662 (1977), citing 1 F. Harper & F. James, *Law of Torts* § 3.20 at 292 (1956). In *Ingraham*, this Court refused to formulate a rule of procedural due process governing corporal punishment in schools because such action "would significantly burden the use of corporal punishment as a disciplinary measure." 430 U.S. at 680.

⁸ According to national statistics, 22,759 persons under age 18, the school-age population, were arrested for weapons offenses in 1982; 76,208 children under age 18 were arrested for drug abuse violations in that same year. *Crime in the United States*, Uniform Crime Reports, 1982, Federal Bureau of Investigation, Table 34, at 182. During 1982, approximately ten percent of the nation-wide number of weapons arrests of children under age 15 occurred in New Jersey, far more than this State's proportionate share based on population. *Crime in New Jersey*, Uniform Crime Report, 1982, Division of the State Police, State of New Jersey.

As discussed above, the exclusionary rule is justified because it is viewed as a deterrent to future unlawful police conduct. There is nothing sacrosanct about the exclusionary rule; it is not embedded in the Constitution, nor is it a personal right. It is now well-established that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" by an unlawful search. *United States v. Calandra*, 414 U.S. 338, 348 (1974). And, as with any remedial device, its application is restricted to those areas where its remedial objectives are "most efficaciously served." *Id.* Hence, it is clear that suppression of evidence is not a right conferred by the Fourth Amendment but, rather, is a remedy designed to effectuate those rights. Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases," 83 *Colum. L. Rev.* 1365, 1390 (1983).

In the case of a search of a student by school officials, the deterrent objective cannot be achieved and the rule must be deemed inapplicable. Even where a search is conducted by law enforcement officers, the rule is not automatically applied; rather, in determining whether to apply the rule, the benefits of deterrence are weighed against the substantial detriment to society and the truth-finding process inherent in excluding relevant evidence of criminality. *United States v. Calandra*, 414 U.S. at 347; see *United States v. Ceccolini*, 435 U.S. 268 (1978). Evidence should be excluded only where the benefit accruing to society from the additional deterrent to unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. Accordingly, this Court has refused to rule "that anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman v. United States*, 394 U.S. 165, 174-175 (1969).

The opinions of this Court concerning the suppression remedy have recognized the serious consequences of suppression of probative and relevant evidence of crime. Indeed, in recent years the continuing vitality of the exclusionary rule has been questioned by members of this Court. See, e.g., *Illinois v. Gates*, ____ U.S. ____, 103 S.Ct. 2317, 2340-2344 (1983) (White, J., concurring); *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 412-424 (1971) (Burger, J., dissenting). Hence, the Court has articulated a balancing test for determining the application of the exclusionary rule.

Unless the benefits of extending the rule to actions by school officials attempting to maintain school discipline outweigh "further encroachment upon the public interest" (*Alderman v. United States*, 394 U.S. at 175) by derogation of the truth-finding process in criminal prosecutions, this Court should decline to further extend the exclusionary rule. Where its deterrent purposes will not be served, there is no justification for the rule. See *Desist v. United States*, 394 U.S. 244, 254 n.24 (1969).

In balancing the possible deterrent benefits of applying the exclusionary rule against its cost to society in the context of public school searches, it is manifest that the balance weighs heavily against excluding evidence.⁹ Indeed, it has been argued that exclusion can be an effective deterrent only if two conditions are met: (1) the searcher must have a strong interest in obtaining convictions, and (2) the searcher must conduct searches and seizures regularly in order to be familiar enough with the rules to adapt his methods to conform to them. *Note*, 19 *Stan. L. Rev.* 608, 614-615 (1967). Neither condition can be met in the case of a public school official. The assistant vice-principal in this case had no interest in obtaining a criminal conviction. Indeed, the object of his search was evidence of a school disciplinary infraction wholly unrelated to any criminal prosecution. The possibility of suppression in a subsequent criminal proceeding, had it occurred to the assistant vice-principal, would not have deterred him from enforcing the school's rules, which was his primary concern.

In this regard, the incentive for school officials to search, occasioned by their educational responsibilities, could not be effectively lessened by the suppression of evidence at a subsequent criminal trial. School officials have a duty to enforce school regulations, to safeguard students during school hours and to maintain a drug-free learning environment. Under the circumstances of this case, the vice-principal should undoubtedly have followed the same course of conduct in his attempt to enforce the school's non-smoking regulations regardless

9 In the case of a student processed through the juvenile court system, there is an additional cost to applying the exclusionary rule. The primary purpose of juvenile delinquency proceedings is to rehabilitate rather than punish the youthful offender. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 539 (1971); *Kent v. United States*, 383 U.S. 541, 554-555 (1966). Where evidence is suppressed in a juvenile proceeding, the injury to the truth-finding process is exacerbated by frustration of this ameliorative purpose and the juvenile, as well as society, is injured.

of his consideration, or knowledge, that any "evidence" seized would not be used later in a court of law.

Furthermore, school authorities conduct searches infrequently, and even less frequently come in contact with the criminal justice system. They are charged with the duty of education, not law enforcement. Hence, their interest in the law of search and seizure is tangential at best. There is little reasonable possibility that a school official would learn the law governing searches and seizures and be able to conform his conduct accordingly. The facts of this case demonstrate this principle quite plainly. The vice-principal, considering the juvenile's ready compliance with his request to hand over her purse, might well have concluded that she consented to the search. Under the standard developed for law enforcement officers by the New Jersey courts in *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975), however, the consent would be invalid because the juvenile was not specifically informed of her right to refuse permission to search. It is unreasonable to require principals, teachers and others not involved in law enforcement to familiarize themselves with complex legal principles which give lawyers and judges pause, and then apply these principles to emergent factual situations.

It could be argued that allowing law enforcement officers to make use of evidence obtained by other public officials who are not involved in law enforcement would reintroduce the long-discarded "silver platter" doctrine. *Lustig v. United States*, 338 U.S. at 79. That is incorrect. The "silver platter" doctrine arose at a time when the exclusionary rule was not yet applicable to the states. Federal law enforcement authorities who conducted illegal searches were able to turn the improperly seized evidence over to the states "on a silver platter" for use in state criminal trials. See *Elkins v. United States*, *supra*. The silver platter doctrine was discarded for a variety of reasons, none of which is applicable to the school situation. First, in *Elkins v. United States*, *supra*, Justice Stewart noted that cooperative law enforcement efforts between state and federal authorities were to be commended and encouraged and that allowing the doctrine to continue under these circumstances would provide an "inducement to subterfuge and evasion." 364 U.S. at 222. See also *United States v. Peltier*, 422 U.S. at 537-539. Because school authorities do not become involved in law enforcement investigations, no such temptation exists. If, of course, a school official acts on behalf of law enforcement officers in a particular case, the courts

are free to suppress the evidence thereby obtained, because it would then be clear that the school authorities would, in fact, be acting as agents of the law enforcement authorities.

A second reason for disallowing the silver platter doctrine was the imperative of judicial integrity. *Elkins v. United States*, 364 U.S. at 222-223. However, this "imperative" has itself been called into question. It is well to argue that the Court should not involve itself in any way in an action violative of the federal Constitution, *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting), but it must also be remembered that by mandating exclusion, the Court requires that the factfinder be presented with a distorted picture of the case and, in a sense, perpetrates a fraud upon the factfinder. See *Stone v. Powell*, 428 U.S. at 485. Additionally, it must be remembered that in many situations use of unconstitutionally seized evidence is permitted. See, e.g., *United States v. Havens*, *supra* (defendant may be impeached by evidence illegally obtained); *Rakas v. Illinois*, 439 U.S. 128 (1978) (standing limitations on who may object to the introduction of unconstitutionally seized evidence); *United States v. Calandra*, *supra* (illegally seized evidence may be used in grand jury proceedings); *Henry v. Mississippi*, 379 U.S. 443 (1965) (counsel's deliberate bypassing of contemporaneous objection to tainted evidence in state court constitutes waiver of federal claim of constitutional violation); *Frisbie v. Collins*, 342 U.S. 519 (1952) (power of a court to try a person for a crime is not impaired by the fact he was brought within the court's jurisdiction by forcible abduction). Thus, this doctrine would provide no support for insertion of the exclusionary rule into the school search situation.

As this Court observed in *United States v. Janis*, *supra*, "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches" of government. 428 U.S. at 459. Supervision of school officials who conduct searches of their students must properly be the primary obligation of a department of government other than the judicial branch. Congress has provided persons aggrieved by unreasonable searches with legal redress in the form of a 1983¹⁰ action for damages, and many state legislatures have provided similar civil damages remedies. Moreover, school administrators, faced with the specter of unreasonable searches by school

10 42 U.S.C. § 1983.

personnel, may choose to enact internal disciplinary measures. In any event, use of the exclusionary rule as a judicial remedy for unreasonable school searches cannot achieve the purpose of general, or even specific, deterrence and is therefore unwarranted.

Since the exclusionary rule was made applicable to the states in *Mapp v. Ohio*, *supra*, police have been educated in the correct methods of performing searches and their knowledge may have deterred the performance of some unlawful searches. The impetus for police instruction in the constitutional niceties of search and seizure law has been the local prosecutors' offices, which have found their own law enforcement functions to be inhibited by the suppression of probative evidence resulting from unconstitutional police searches. Because police and prosecutors share the common occupational objective of enforcement of the criminal laws and constantly interact to achieve their objective, police officers have an incentive to become aware of the constitutional constraints on their investigative abilities. This same motivation is wholly absent on the part of school officials who do not in the normal course collaborate with prosecutors and do not function to enforce the law. Indeed, teachers have no professional incentive to follow stringent procedures otherwise correct for law enforcement officers, because they would have little interest in either developing a cooperative relationship with the prosecutors or in convicting their students of crimes.

The facts of the present case illustrate the lack of justification for extending the exclusionary rule to a school search. A teacher observed a group of girls in a restroom and identified T.L.O. and another girl as smoking cigarettes, a prohibited activity. The assistant vice-principal could have punished T.L.O. based solely upon the teacher's observation. T.L.O., however, disputed the accuracy of the teacher's perception and not only denied smoking at that time, but denied that she smoked at all. T.L.O.'s denial sharply contrasted with the immediate admission of T.L.O.'s companion. This second girl acknowledged smoking and, without further investigation, the vice-principal required her to attend a smoking clinic as punishment. Faced with T.L.O.'s absolute denial and the second girl's admission, the school official had no practical alternative but to take the reasonable step of requesting and opening T.L.O.'s purse. If no cigarettes had been found, it is probable that T.L.O. would have received only a warning.

In enforcing school discipline, it is prudent to leave educators with choices unrestricted by considerations of evidentiary questions. A teacher concerned with preserving possible evidence would be hard-pressed to administer or enforce the school's own regulations. Concern with application of the exclusionary rule could have a chilling effect on proper inquiries into minor school infractions. Such inquiries are often necessary to maintain discipline in schools. Indeed, the New Jersey Supreme Court appeared to recognize the necessity for such school disciplinary investigations when it stated:

We do not disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information they possess.... The issue here is not criticism of their actions.... [*State in the Interest of T.L.O.*, 94 N.J. at 349, 463 A.2d at 943].

The New Jersey Supreme Court thus appeared to recognize that the actions of the school officials were contextually reasonable. But without further justification, that court went on to apply the exclusionary rule despite the fact that there was no possibility that its deterrent purpose could be achieved.

Thus, as demonstrated by the foregoing arguments, application of the exclusionary rule to school searches would be costly and ineffective. By definition, the suppression of evidence impedes the search for truth and frustrates achievement of that goal. To do so under the facts of the present case, moreover, would impose a stiff societal cost. In attempting to maintain discipline by enforcing the school's non-smoking regulation, a vice-principal, in an action "not disparaged" by the state court, opened a student's purse and found evidence that the girl was selling drugs to other students. Although the girl was guilty of using the schoolhouse to dispense drugs, the evidence of the girl's crime was suppressed and she returned undeterred to the classroom. The detrimental result of this action on public education cannot be overestimated. If school authorities are unable to take effective action to enforce discipline and provide a crime-free environment for learning, then the primary purpose of the public school, that is, universal education, will not be achieved. The incalculable loss falls upon the well-intentioned pupils and their innocent parents.

In sum, balanced against the cost, there is little or no benefit to be gained by application of the exclusionary rule. The primary value

of the exclusionary rule, deterrence, is not present, for school officials acting in the course of their employment have little or no interest in criminal proceedings and are not likely to know whether or why evidence they have discovered has been suppressed. Because it is unlikely that the future conduct of school officials can be "corrected" or deterred by application of the exclusionary rule, there exists no reason to extend the rule to the school search situation. Thus, application of the exclusionary rule to searches performed by school authorities is without practical benefit or justification.

CONCLUSION

For the foregoing reasons, the State of New Jersey urges this Court to rule that the exclusionary rule is inapplicable to school searches performed by school administrators and teachers and to reverse the decision of the New Jersey Supreme Court suppressing evidence.

Respectfully submitted,

s/I.I.K.

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Petitioner

Allan J. Nodes
Victoria Curtis Bramson
Deputy Attorneys General

On the Brief

Dated: January 14, 1984

FEB 9 1984

ALEXANDER L. STEVAS.

CLERK

No. 83-712

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

v.

T.L.O., a Juvenile,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of New Jersey

BRIEF OF RESPONDENT

JOSEPH H. RODRIGUEZ
Public Defender of New Jersey

LOIS DE JULIO
First Assistant
Deputy Public Defender
Appellate Section
20 Evergreen Place
East Orange, New Jersey 07018
(201) 648-3280

Attorneys for Respondent

ANDREW DILLMANN
Assistant Deputy Public Defender

TINA BOYER
Legal Assistant

QUESTIONS PRESENTED

1. Was the decision of the New Jersey Supreme Court to suppress evidence illegally seized from respondent by her high school vice-principal based upon independent and adequate State grounds?

2. In the alternative, as a matter of federal law, is application of the exclusionary rule constitutionally required when the prosecution attempts to use the fruits of an illegal search by a public school official on its case-in-chief in a criminal matter?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New Jersey Constitution of 1947, Article I, paragraph 7.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

New Jersey Constitution of 1947, Article VIII, section 4, paragraph 1.

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

N.J. Stat. Ann. § 2A:4-60.

All defenses available to an adult charged with a crime, offense or violation shall be available to a juvenile charged with committing an act of delinquency . . . the right to be secure from unreasonable searches and seizures . . . shall be applicable in cases arising under this act as in cases of persons charged with crime.

N.J. Stat. Ann. § 18A:25-2.

A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school . . .

N.J. Stat. Ann. § 18A:37-1.

Pupils in the public schools shall comply with the rules established in pursuance of law for the government of such schools, pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them.

N.J. Stat. Ann. § 18A:6-1.

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending

such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary: (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intentment of this section . . .

N.J. Stat. Ann. § 18A:37-2(j)

. . . Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include. . . .

j.. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

STATEMENT OF THE CASE

On March 7, 1980, a search was made by Mr. Choplik, vice principal of Piscataway High School, of a purse belonging to T.L.O., a student at the school. Ms. Chen, a teacher, had made a routine check of the girls' restroom. She observed T.L.O. and another girl smoking tobacco cigarettes. (TS 20-7 to 25)¹ Although smoking by students was permitted in designated areas, it was not allowed in the restrooms. (TS 33-20 to TS 34-6) Ms. Chen accompanied both girls to Mr. Choplik's office, where she advised him of the infraction. (TS 21-1 to TS 22-23)

Upon being questioned, T.L.O. denied that she smoked. (TS 27-1 to 21) Mr. Choplik asked T.L.O. to give him her handbag because he wanted to see whether she had any cigarettes, which he believed would constitute proof that she had been smoking. (TS 31-1 to 13) When T.L.O. complied, Mr. Choplik

¹ "TS" designates the transcript of the hearing on the Motion to Suppress held on September 26, 1980. "T" refers to the transcript of the trial, conducted on March 23, 1981.

opened the purse and observed, "a package of Marlboros sitting right on the top there." (TS 28-3 to 11) As he removed the Marlboros, Mr. Choplik also observed cigarette rolling papers. He removed them, too. (TS 28-21 to TS 29-5) Mr. Choplik explained that "from then on I went to see what else was in there because from my experiences that seems to be a sign that someone is smoking marijuana." (TS 29-7 to 9)

Looking further into the handbag, he found a metal pipe, and one plastic bag containing tobacco or some similar substance.² (TS 29-10 to 16) He also found a wallet containing "a lot of singles and change," and inside a separate compartment of the purse, two letters and an index card. (TS 36-7 to 10; TS 38-6 to 12; TS 40-20 to 22; TS 39-4 to TS 49-11) Mr. Choplik then phoned T.L.O.'s mother, and the police. (TS 41-8 to 10)

Mr. Choplik admitted that T.L.O.'s purse was closed when she gave it to him and that he could not see inside until after he opened it. (TS 47-14 to 25) He also agreed that at the time Ms. Chen initially accused T.L.O. of smoking, he had a sufficient basis to impose a sanction without need for further evidence. (TS 47-9 to 13)

The local police transported T.L.O. and her mother to headquarters. Upon arrival, Officer O'Gurkins advised the juvenile of her *Miranda* rights. (T 20-7 to T 21-3) When Mrs. O. indicated that she wanted to have an attorney present during questioning, she was permitted to telephone the office of her lawyer. (T 34-10 to 24) He was not available, so the officer proceeded with the interrogation. According to Mrs. O., at no time did her daughter state that she had sold marijuana. (T 35-15 to 22)

Officer O'Gurkins admitted that although it was standard practice in juvenile matters to reduce incriminating state-

² At trial it was stipulated that the bag contained 5.40 grams of marijuana. (T 12-17 to 25)

ments to writing, he did not follow this procedure with T.L.O. (T 24-12 to 18) He nevertheless maintained that T.L.O. had confessed that she had been selling marijuana in school for a week. (T 22-2 to 17) He conceded that T.L.O. explained to him that the \$40.98, which was found in her purse, constituted the proceeds from her paper route, which she had collected the night before.

On September 26, 1980, a motion was brought before the Honorable George J. Nicola, J.J.D.R.C., to suppress the evidence seized as a result of Mr. Choplik's search. The search was found by the Juvenile Court to be legal, and the motion was denied. *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 342-45, 428 A.2d 1327 (J.D.R.C. 1980). After a trial held on March 23, 1981, T.L.O. was found guilty of possession of marijuana with intent to distribute. On January 8, 1982, a probationary term of one year was imposed.

An appeal as taken and decided on June 30, 1982. *State in the Interest of T.L.O.*, 185 N.J. Super. 279, 448 A.2d 493 (App. Div. 1982). Two judges affirmed the denial of the motion to suppress the evidence secured by the search of the juvenile's purse, adopting the reasons set forth in the opinion of the trial court. However, they found that the record was inadequate to determine the sufficiency of the *Miranda* waiver which was allegedly made by the juvenile after her mother's unsuccessful attempt to summon counsel. *Id.*, 448 A.2d at 493. They therefore vacated the adjudication of delinquency and ordered a remand for further proceedings in light of the principles enunciated in *Edwards v. Arizona*, 451 U.S. 477, (1981) and *State v. Fussell*, 174 N.J. Super. 14 (App. Div. 1980). *Id.* One judge dissented, indicating that he would suppress the evidence found in T.L.O.'s purse because the search had been unreasonable. *Id.* at 495.

An appeal was taken to the New Jersey Supreme Court. On August 8, 1983, judgment was rendered ordering that the evidence seized from T.L.O. be suppressed. The court ruled that students are persons protected by both the United States

and the New Jersey Constitutions, and that the juvenile justice system must reflect the same fundamental fairness guaranteed to adult offenders. *State in the Interest of T.L.O.*, *supra*, 463 A.2d at 938. The argument that school officials be viewed as private persons acting *in loco parentis* was rejected; relying upon both federal and state case law, the court held that public school authorities are government officers. *Id.* at 939. It was further determined, citing to both decisions of the United States Supreme Court in administrative search cases, and to *N.J.S.A. 2A:4-60* (which accords juveniles the right to be secure from unreasonable searches and seizures) that if an official search violates constitutional rights, the resulting evidence is not admissible in criminal proceedings. *Id.*

With regard to the standards governing such searches, it was decided that a warrant need not be secured. *Id.* at 940. After reviewing various New Jersey statutes regulating education, the court found that school officials have the power to conduct reasonable searches necessary to maintain safety, order and discipline within the schools. *Id.* at 940. Analogizing to the decision of "Our Court" with regard to administrative searches, it was held that school searches come within the "carefully defined" class of searches which can be conducted without a warrant. *Id.* at 939.

Recognizing that school officials do not act pursuant to the same responsibilities and motivations as police officers, the Court rejected the juvenile's contention that school searches could only be carried out on the basis of probable cause. Adopting the approach taken by a number of state and lower federal courts, the Court ruled that "when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence." *Id.* at 942.

Applying these principles to the facts surrounding the search of T.L.O., the New Jersey Supreme Court found that the principal did not have reasonable grounds to open her

purse. Since school policy allowed smoking in specially designated areas, and possession of cigarettes was not, therefore, a violation of school rules, Mr. Choplik had no reasonable grounds to believe that the student was concealing illegal substances in her purse. *Id.* at 942. The court further held that even if the initial opening of the purse had been reasonable, the subsequent "wholesale rummaging" of the student's letters and papers exceeded the proper scope of the search. *Id.* at 943.

Two judges dissented from the above decision finding that the assistant principal's search of T.L.O. was reasonable in light of all of the circumstances. *Id.* at 946.

SUMMARY OF ARGUMENT

Initially, respondent maintains that the judgment of the New Jersey Supreme Court was based upon independent and adequate state grounds, and that *certiorari* should be dismissed. Although the New Jersey court referred to federal law, the decision was also founded upon two provisions of the New Jersey Constitution (which guarantee the rights to be secure from unreasonable searches and seizures, and to receive a thorough and efficient education), and upon a New Jersey statute (which specifically grants to juveniles the right to be free of unreasonable searches). Because the decision is sufficiently and independently supported by state law, the outcome would remain the same even if the federal principles referred to therein should be modified. *Certiorari* must, therefore, be dismissed as this Court has no jurisdiction to issue advisory opinions.

Assuming *arguendo*, that the decision of the New Jersey Supreme Court does present a federal question for adjudication, petitioner's contention that the exclusionary rule need not be applied to the fruits of the illegal search at issue in this matter is clearly erroneous. The Fourth Amendment protects against unreasonable searches conducted by any governmental agency. Because public school personnel are employed by the state, act with state authority, and are responsible for carrying out state laws and regulations, their conduct con-

stitutes governmental, rather than private, action. Thus the search of T.L.O. by the vice-principal comes within the ambit of the Fourth Amendment.

While petitioner is correct in asserting that this Court has not found the exclusionary rule to be constitutionally required in the case of every Fourth Amendment violation, those instances where it has not been applied have involved limited, peripheral uses of the evidence so obtained. This Court has not permitted the fruits of an illegal search to be introduced into evidence on the prosecution's case-in-chief in a criminal proceeding, as the State seeks to do in the present matter. In such circumstances, application of the rule is mandatory.

Even if petitioner is correct in maintaining that a balancing test—weighing the benefits of deterrence against the societal costs resulting from implementation of the rule—is constitutionally permissible to determine if the exclusionary rule should be applied in the present circumstances, it is clear that the expected benefits would outweigh the anticipated detriments. First, educators do have an interest in the successful prosecution of juvenile delinquency proceedings and would be deterred from conducting unreasonable searches by the knowledge that the resulting evidence would be excluded. Second, if evidence illegally secured by educators was not admissible at trial, the police would be deterred from instigating teachers to conduct illegal searches in order to provide otherwise unobtainable evidence on “a silver platter.” With regard to societal costs, statistical studies have shown that relatively few prosecutions are dismissed because of Fourth Amendment problems. School surveys do not support the conclusion that the crime rate in schools is rising or that an increase in searches by school personnel would be a significant factor in reducing the present rate.

Petitioner has demonstrated no alternatives to the exclusionary rule which would effectively deter violations of the Fourth Amendment rights of students. In addition, the exclusionary rule serves constitutionally recognized purposes

other than deterrence; it protects the imperative of judicial integrity, and teaches respect for constitutional rights.

LEGAL ARGUMENT

POINT I

AS THE DECISION BELOW RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS THIS COURT SHOULD DISMISS THE WRIT OF *CERTIORARI* AS IMPROVIDENTLY GRANTED.

Petitioner sought *certiorari* in this matter pursuant to 28 U.S.C. § 1257 which grants this Court jurisdiction when a "right privilege or immunity is . . . claimed under the Constitution" of the United States. The granting of a writ of *certiorari* does not, however, constitute a final disposition of the question of whether jurisdiction, in fact, exists for the case to be heard.

[T]he initial decision to grant a petition for *certiorari* must necessarily be based on a limited appreciation of the issues in a case. . . . The Court does not, and indeed it cannot and should not try to, give the initial question of granting or denying a petition the kind of attention that is demanded by a decision on the merits. *Ferguson v. Moore-McCormack Lines*, 352 U.S. 524, 527 (1957) (Frankfurter, J., dissenting).

As a threshold question, therefore, this Court must now determine if its jurisdiction has been properly invoked in this matter. See *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

Article III of the Federal Constitution, the source of this Court's power, requires a live controversy between the parties to an action; the issuing of advisory opinions is not permitted. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947). With regard to the decisions of state courts, this court has observed that:

Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, supra.

Thus where the decision of a state court rests upon both state and federal grounds, the jurisdiction of this Court fails if the state ground is independent of the federal and is adequate to support the judgment. *Id.*; *Fox Film Corp v. Muller*, 296 U.S. 207 (1935). If the state court would have reached the same result, regardless of federal law, considerations of federalism, and of the "case or controversy" requirement of Article III require that the state court's decision not be reexamined. *Enterprise Irrigation District v. Canal Co.*, 243 U.S. 157, 164 (1917).

The majority opinion in *Michigan v. Long*, ____ U.S. ____, 103 S.Ct. 3469 91983), decided last term, reaffirmed these principles even as it established more exacting criteria under which this Court would treat a state court decision as one based on state law. Jurisdiction would be found "in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 3478. The sufficiency and independence of the state ground must be apparent from the "four corners of the opinion." *Id.* at 3475.

In the instant matter, a review of the opinion below leads inescapably to the conclusion that the outcome rests upon independent state grounds, and would be unaffected by any modification of the federal constitutional considerations alluded to in the opinion. At the very outset, the New Jersey Supreme Court noted that, "young people and students are persons protected by the United States and New Jersey Constitutions." (emphasis supplied) *State in the Interest of T.L.O.*, *supra*, 463 A.2d at 938. Thus the court clearly signalled that the decision would have its roots in both state and federal constitutional principles. The adequacy and sufficiency of the

state ground was plainly evidenced by further statements in the decision.

First, the court rested its conclusion that the State cannot use evidence illegally seized from a student against her in a juvenile proceeding upon a provision of the New Jersey Code of Juvenile Justice [N.J. Stat. Ann. § 2A:4-60] which guarantees to juveniles the right to be secure from unreasonable searches. *State in the Interest of T.L.O.*, *supra* at 939, n. 5. In concluding that suppression was required by this provision of state law, the New Jersey court also expressed its belief that the impropriety of so using evidence illegally obtained by public officials was settled, as a matter of federal constitutional law, by this Court's decision in *See v. City of Seattle*, 387 U.S. 541 (1967); *Camara v. Municipal Court*, 387 U.S. 523 (1967); and *Michigan v. Tyler*, 436 U.S. 499 (1978). However, reference to parallel federal decisions does not, of itself, compel a determination that a decision is based entirely upon federal law; only if it appears that the "state court felt 'compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did,' " [*Michigan v. Long*, *supra* 3478, quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977)] is the asserted sufficiency of the alternate state ground undermined. *Id.*

Here, the New Jersey court did not hold that because federal law demanded the suppression of evidence resulting from illegal searches of students by teachers, N.J. Stat. Ann. § 2A:4-60 must be construed to require this result; on the contrary, it said, "Our Code of Juvenile Justice buttresses this conclusion." Thus the existence of N.J. Stat. Ann. § 2A:4-60 provided support independent of federal law for the decision that the evidence must be suppressed. Given this mandate of New Jersey law as construed by the highest judicial tribunal of the state, it is clear that "the same judgment would be rendered by the state court," [*Michigan v. Long*, *supra*, at 3476 (quoting *Herb v. Pitcairn*, *supra* at 126)], even if this defendant were protected only by the provisions of the New Jersey Juvenile Justice Code, thus rendering an interpretation of the Federal Constitution "nothing more than an advisory opinion." *Id.*

The New Jersey Supreme Court, based upon its understanding of this Court's decision in *See v. Seattle, supra*, *Camara v. Municipal Court, supra*, and *Michigan v. Tyler, supra*, found the United States and State Constitutions to be equally protective of the rights of student to be free from unreasonable searches by school teachers. "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate state ground of decision depriving this court of jurisdiction to review the state judgment." *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 491-92 (1965).

Furthermore in determining that educators are not private citizens, but governmental officials against whom the prohibition against unreasonable searches applies, the New Jersey Supreme Court cited both *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943), and to *State in the Interest of G.C.*, 121 N.J. Super. 108, 114, 296 A.2d 102 (J.D.R.C. 1972), a prior New Jersey decision involving a search of a student by a teacher. *State in the Interest of G.C., supra*, in turn based its conclusion that teachers are government functionaries exclusively upon New Jersey civil case law. Consequently, even if this Court were to modify the federal constitutional principles underpinning *West Virginia Bd. of Ed. v. Barnette, supra*, the outcome in the instant matter would remain the same. Such a decision by this Court would, then, be purely advisory; the New Jersey courts would still be required by state law to hold that searches by school personnel amount to governmental action.

Furthermore, the New Jersey Supreme Court made explicit that its decision rested equally on state constitutional protections which have no federal analogue. The *T.L.O.* court concluded that "our approach represents the best way to vindicate each student's right to be free from unreasonable searches and to receive a thorough and efficient education." (emphasis supplied) *Id.* at 942. The right to a "thorough and efficient education" is guaranteed to all New Jersey children between the

ages of five and eighteen by Article VII, Section 4, paragraph 1 of the New Jersey Constitution (1947). The United States Constitution, as construed by this Court, has no such requirement. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Moreover, the New Jersey Supreme Court does not merely pay lip service to state constitutional provisions as was the case in the state court decision in *Michigan v. Long*, *supra* at 3477. The court reviewed no less than seven statutory provisions³ which involve New Jersey educators in the regulation of student conduct that interfaces with the criminal justice process. Based on this analysis, the court concluded that "[w]e are satisfied that the Legislative scheme for public education in New Jersey contemplates a narrow band of administrative searches to achieve educational purposes." *Id.* at 940.

Since the educational guarantees of Article VIII, section 4, paragraph 1, have no corollary in the Federal Constitution, the New Jersey Court's reliance upon this ground is surely independent of any federal constitutional considerations. Moreover, in construing the constitutional mandate of a "thorough and efficient" education and its statutory implements, the New Jersey Court has a wholly sufficient basis to rule that school

³ N.J. Stat. Ann. § 18A:25-2 (West Supp. 1983) (disorderly conduct); N.J. Stat. Ann. § 18A:37-1 (West 1968) (submission of pupils to authority); N.J. Stat. Ann. § 18A:37-2(j) (West Supp. 1983) (school officials have power to suspend pupils for illegal possession or consumption of drugs and alcohol); N.J. Stat. Ann. § 18A:37-2.1 (West Supp. 1983) (assaulting teachers); N.J. Stat. Ann. § 18A:37-2 and N.J. Stat. Ann. § 18A:37-4 (West Supp. 1983) (suspension of students for good cause); N.J. Stat. Ann. § 18A:40-4.1 (West Supp. 1983) (role of principal when student abused drugs or alcohol); N.J. Stat. Ann. § 18A:35-4a (West Supp. 1983) (board of education shall establish policies and procedures for evaluating and treating alcohol users); and N.J. Stat. Ann. § 18A:6-1 (west 1968) (empowering teachers to seize weapons and quell disturbances).

children cannot be harassed by official searches except under certain narrowly limited circumstances.

Additionally, the *T.L.O.* decision is also rooted in Article I, paragraph 7 of the New Jersey Constitution (1947), which protects against unreasonable searches and seizures. For example, in deciding that a school official need not apply for a warrant, the New Jersey court cited two New Jersey cases in support of this proposition: *State v. Patino*, 83 N.J. 1, 414 A.2d 1327 (1980), and *State v. Bruzzese*, 94 N.J. 210, 463 A. 2d 320 (1983). *State in the Interest of T.L.O.*, *supra* at 939. Both of these cases specifically rely upon Article I, paragraph 7 of the State Constitution. Similarly, with regard to the standard by which the legality of school searches must be evaluated, the New Jersey court referred to several federal cases, but also relied upon *In re Martin*, 90 N.J. 295, 447 A.2d 1290 (1982), a case involving the reasonableness of administrative inspections of gambling casinos, decided pursuant to both the State and Federal Constitutions. *State in the Interest of T.L.O.*, *supra* at 941.

Although Article I, paragraph 7 of the New Jersey Constitution (1947), uses the same language as the Fourth Amendment, the New Jersey Supreme Court has frequently construed the state provision as guaranteeing more expansive protections. See e.g., *State v. Alston*, 88 N.J. 211, 440 A.2d 1311, 1319 (1981) (finding that under the State Constitution a person's ownership of or possessory interest in property confers standing for search and seizure purposes, despite *Rakas v. Illinois*, 439 U.S. 128 (1978)); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66, 67-68 (1975) (holding that under the State Constitution, if the prosecution wants to assert that a search was made pursuant to consent, the state has the burden of showing that defendant knew he could refuse; *contra* *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1972) (requiring that under the State Constitution a warrant must be obtained to secure an individual's billing records from the telephone company, despite the decision in *Smith v. Maryland*, 442 U.S. 735 (1979) that a telephone user

has no Fourth Amendment expectation of privacy in phone company records.) Indeed had this case been decided in the New Jersey courts solely on federal constitutional grounds it is doubtful that the court would have even reached the issue of reasonableness in evaluating the search conducted in *T.L.O.* For, the facts of *T.L.O.* suggest that a "consent" cognizable under federal, but not New Jersey, law had been granted by the student whose purse was searched.⁴ *State in the Interest of T.L.O.*, *supra* at 940.

Furthermore, New Jersey has not been reticent in finding that provisions of its State Constitution and statutes extend greater protection than do equivalent provisions of the United States Constitution. "[S]tate constitutions exist as a cognate source of individual freedoms and . . . state constitutional guarantees of these rights may indeed surpass the guarantees of the federal constitution." *State v. Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980). See e.g., *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982) (enhanced equal protection accorded individual right to health and privacy; *contra Harris v. McRae*, 448 U.S. 297 (1980)); *State v. Schmid*, 84 N.J. 535, 553, 423 A.2d 615 (1980) (right of free speech on private university campus); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 79 389 A.2d 465 (1978) (sex based presumptions may not be used to deny women employment rights equal to those accorded men); *State v. Saunders*, 75 N.J. 200, 216, 217, 381 A.2d 333 (1977) (right of sexual privacy; *but cf. Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (D.C. Cir.), *aff'd* 425 U.S. 901, reh. den. 425 U.S. 985 (1976)); *Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp.*, 80 N.J.

⁴ See also *State in the Interest of T.L.O.*, 178 N.J. Super. 329, 428 A.2d 1327 (J.D.R.C. 1980). T.L.O. had handed her purse to the vice-principal upon his request. The New Jersey courts relying on *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) held that any consent by the juvenile was ineffective because she had not been told of her right to withhold consent. *But cf. Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

6, 43, 364 A.2d 1016 (1976) (equal protection standard requires real and substantial relationship between the classification and the governmental purpose which is purportedly served, *but cf. Dandridge v. Williams*, 397 U.S. 481, 485 (1970)); *In re Quinlan*, 70 N.J. 10, 19, 40-41, 513 A.2d 647 (1976), *cert. den. sub. nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (right of choice to terminate life support systems as aspect of right of privacy); *So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 175, 336 A.2d 713, *cert. den. and appeal dismissed*, 423 U.S. 808 (1975) (zoning obligation of municipalities to provide housing opportunities for lower income groups); *State v. Gregory*, 66 N.J. 510, 513-514, 333 A.2d 257 (1975) (expansion of the double jeopardy protection to require joinder of known offenses based on same conduct or arising from same criminal episode); *Robinson v. Cahill*, 62 M.J. 473, 482, 509, 303 A.2d 273 (1973) *cert. den. sub. nom.*, *Dickey v. Robinson*, 414 U.S. 976 (1973) (equal protection accorded right to an education); *Worden v. Mercer County Bd. of Elections*, 61 N.J. 325, 345-346, 294 A.2d 233 (1972) (college students entitled to vote in their college communities and may not be subjected to additional questioning). Thus, even a cursory review of New Jersey case law reveals an extensive and bona fide pattern of reliance upon the State Constitution for greater protections than mandated.

Respondent therefore maintains that since the decision below rests on independent and adequate state grounds and the outcome of this case would remain the same regardless of any changes in federal law, *certiorari* must be dismissed.

POINT II

THE FOURTH AMENDMENT EXCLUSIONARY RULE IS CONSTITUTIONALLY MANDATED WHEN THE STATE ATTEMPTS TO USE ON ITS CASE-IN-CHIEF EVIDENCE ILLEGALLY SEIZED FROM A STUDENT BY PUBLIC SCHOOL PERSONNEL.

This case arises from the prosecution's attempt to use evidence illegally seized from T.L.O., a high school student, to directly prove her guilt of a criminal charge in a court proceed-

ing. Petitioner makes no attempt to demonstrate that the search was legal, but argues instead that when, as here, an illegal search is conducted by a school employee rather than a police officer, the Fourth Amendment exclusionary rule need not be applied. This contention is without legal or factual support. Since school employees are government agents, their actions are subject to the Fourth Amendment. Moreover, when evidence illegally obtained by government action is sought to be introduced on the prosecution's case-in-chief, application of the exclusionary rule is constitutionally mandated.

A. Searches Conducted By School Personnel Constitute Governmental Rather Than Private Action And Are Therefore Subject To The Fourth Amendment

The safeguards provided by the Constitution are not limited to adult citizens. *In re Winship*, 397 U.S. 358 (1979); *In Re Gault*, 387 U.S. 1 (1967). As was stated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969):

School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

On numerous occasions, albeit in other contexts, it has been decided by this Court that students do not "shed their constitutional rights . . . at the schoolhouse gate" [*Id.* at 506], and that conduct by school officials in derogation of these rights amounts to government action. *Id.*, at 506-07; *Island Trees Union Free School District No. 26 Board of Education v. Pico*, 457 U.S. 853 (1982); *Goss v. Lopez*, 419 U.S. 565 (1975); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Admittedly, with regard to the question of whether school personnel are government agents in the specific context of the

Fourth Amendment, this Court has thus far made no ruling. However, the great majority of lower federal, and state courts which have considered this question have concluded, as did the Supreme Court of New Jersey below, that searches of students by school employees constitute governmental action and come within the ambit of the Fourth Amendment.⁵

⁵ *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982), cert. den. — U.S. —, 103 S.Ct. 3536 (1983); *M. M. v. Anker*, 607 F.2d 588 (2nd Cir. 1979); *Jones v. Latezo Independent School District*, 499 F.Supp. 223 (E.D. Tex. 1980); *Bilbrey v. Brown*, 481 F.Supp. 26 (D. Or. 1979); *Doe v. Renfrew*, 475 F.Supp. 1012 (N.D. Ind. 1979), mod. 631 F.2d 91 (7th Cir. 1980), reh. den. 635 F.2d 582 (7th Cir. 1980), cert. den. 451 U.S. 1022 (1980); *Bellnier v. Lund*, 438 F.Supp. 47 (N.D.N.Y. 1977); *M. v. Board of Education Ball-Chatham Community Unit School District No. 5*, 529 F.Supp. 288 (S.D. Ill. 1977); *Picha v. Wielgos*, 410 F.Supp. 1214 (W.D. Ill. 1976); *Smyth v. Lubbers*, 398 F.Supp. 777, 7876 (W.D. Mich. 1975); *United States v. Coles*, 302 F.Supp. 99 (N.D. Me. 1969); *In re W.*, 29 Cal. App. 3d 377, 105 Cal. Rptr. 775 (D. Ct. App. 1973); *In re C.*, 26 Cal. App. 3d 320, 102 Cal. Rptr. 682 (D. Ct. App. 1976); *State v. Baccino*, 282 A.2d 869 (Del. Super. 1971); *State v. F.W.E.*, 360 So. 2d 148 (Fla. D.Ct. App. 1978); *State v. Young*, 234 Ga. 488, 216 S.E. 2d 586 (1975), cert. den. 423 U.S. 1039 (1975); *State in the Interest of J.A.*, 85 Ill. App. 3d 567, 406 N.W. 2d 958 (App. Ct. 1980); *State v. Mora*, 307 So. 2d 317 (La. 1975), vac. 423 U.S. 309 (1975), remand 330 So.2d 900 (La. 1976); *People v. Ward*, 62 Mich. App. 46, 233 N.W. 2d 180 (App. Ct. 1975); *State in the Interest of T.L.O.*, supra, 463 A. 2d at 939; *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Sup. Ct. 1975); *People v. Singletary*, 37 N.Y. 2d 310, 372 N.Y.S. 2d 68 (Ct. App. 1975); *People v. Scott D.*, 34 N.Y. 2d 483, 358 N.Y.S. 2d 403 (Ct. App. 1974); *People v. Jackson*, 65 Misc. 2d 909, 319 N.Y.S. 2d 731 (App. Term. 1st Dept. 1971), aff'd 30 N.Y. 2d 734, 333 N.Y.S. 2d 167 (Ct. App. 1972); *State v. Wingerd*, 40 Ohio App. 2d 236, 318 N.E. 2d 866 (Ct. App. 1974); *State v. Walker*, 19 Or. App. 420, 528 P.2d 113, 115 (1974); *State v. McKinnon*, 88 Wash. 2d 75, 558 P.2d 781 (Sup. Ct. 1977); *Interest of L.L.*, 90 Wis. App. 2d 585, 280 N.W. 2d 343 (Ct. of App. 1979).

This conclusion is constitutionally required. It has long been recognized that while the Fourth Amendment has no application to conduct by private persons, it protects against invasion of privacy by any governmental agency. *Michigan v. Clifford*, — U.S. —, 104 S.Ct. 641, 646 (1984); *Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Gouled v. United States*, 255 U.S. 298, 305 (1920); *Weeks v. United States*, 232 U.S. 383, 391-91 (1914); *Boyd v. United States*, 116 U.S. 524, 532 (1886). The definition of "governmental agent" has not been limited to the police:⁶

The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed. 2d 930, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. See *v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 2d 943, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-313, 98 S.Ct. 1816, 1819-1821, 56 L.Ed. 2d 305. These deviations

⁶ In point of historical fact, the Fourth Amendment developed in large part as a response to the Colonists' experiences not with the police, but with the regulatory agents designated to implement various parliamentary revenue measures. *Marshall v. Barlow's Inc.*, *supra* at 312. We do not know what the Framers' attitude would have been toward searches conducted by public school teachers, but as Chief Justice Burger has observed, "the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth." *United States v. Chadwick*, 433 U.S. 1, 8-9 (1977).

from the typical police search are thus clearly within the protection of the Fourth Amendment.

Michigan v. Tyler, *supra* at 504-05.

Thus, the Fourth Amendment has been held to apply to "administrative" searches by such non-police governmental employees as building inspectors [*Camara v. Municipal Court*, *supra*]; firemen [*Michigan v. Tyler*, *supra*]; occupational health and safety inspectors [*Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)]; alcohol tax collectors [*Jones v. United States*, 357 U.S. 493 (1958)]; and border patrol officers [*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)]. None of these agents is primarily concerned with law enforcement; however, all are governmental employees, act with governmental authority, and are charged with the implementation of laws and regulations.

Similarly, it has been held that school personnel are government agents for Fourth Amendment purposes because they are state employees who rely on state authority for their actions. See *e.g.*, *Interest of L.L.*, *supra*, 280 N.W. 2d at 347; *People v. Scott D.*, *supra*, 358 N.Y.S. 2d at 405; *In the Interest of J.A.*, *supra*, 406 N.E. 2d at 960; *State v. Walker*, *supra*, 528 P.2d at 115-16; *State v. Baccino*, *supra*, 282 A.2d at 871; Comment, *Students and The Fourth Amendment: "The Torturable Class,"* 16 U.C.D.L. Rev. 709, 713-14 (1983) (hereinafter *The Torturable Class*). State regulation of teachers is pervasive, and boards of education are statutorily obligated to indemnify teachers in civil actions arising from their employment. *Bellnier v. Lund*, *supra* at 51.

State action has also been found because school authorities are responsible for enforcing numerous laws and regulations related to education. *State v. Mora*, *supra*, 307 So. 2d at 319. For example, some courts have noted that school attendance is compulsory, and school authorities are responsible for enforcing compliance with this legal mandate. See *e.g.*, *Bellnier v. Lund*, *supra* at 51; *D.R.C. v. State*, 646 P. 2d 252, 255 (Alas. Ct. App. 1982); *Horton v. Goose Creek Ind. School Dist.*, *supra* at 480.

Others have focused on the fact that educators have substantial regulatory duties with regard to the maintenance of a safe and orderly educational environment. See e.g., *Horton v. Goose Creek Ind. School Dist.*, *supra*; *Doe v. Renfrew*, *supra*, 475 F. Supp. at 1020; *Interest of L.L.*, *supra*; *State v. Baccino*, *supra* at 871; *People v. Jackson*, *supra*, 319 N.Y.S. 2d at 733. Certainly a review of state statutes would support this conclusion. In some states, educators have a statutorily imposed duty to maintain good order and discipline in the school.⁷ Others, including New Jersey, require teachers to enforce order in school and to hold students strictly accountable for any disorderly conduct.⁸

In many states, the prescribed duties of school employees are more specifically oriented toward law enforcement. A number require teachers and administrators to report evidence or incidents of crime to the police.⁹ In Alabama, a school employee who fails to make such a report is himself/herself guilty of a Class C misdemeanor. Ala. Code § 16-1-24 (Supp. 1983). Similarly, teachers in Mississippi and Rhode Island commit misdemeanors if they allow students to possess weapons on school grounds [Miss. Code Ann. § 973717 (1973)], or permit any act which injures, or frightens, any person attend-

⁷ See e.g., Fla. Sta. Ann. § 232.27 (1981); Ind. Code § 0-8.1-5-2 (Burns Supp. 1983); N.C. Gen. Stat. § 115C-307 (Supp. 1981); N.M. Stat. Ann. § 22-10-5 (1978); Wash. Rev. Code Ann. § 28A.27.010 (1982).

⁸ See e.g., Ariz. Rev. Stat. Ann. § 15-201 (1975); Ark. Stat. Ann. § 80-1629.2 (1980); Ky. Rev. Stat. Ann. § 161.180 (1980); La. Rev. Stat. Ann. § 17:416 (West Supp. 1983); Mont. Code Ann. § 20-4-302 (1983); Nev. Rev. Stat. § 391.270 (1979); N.J. Stat. Ann. § 18A:25-2 (West Supp. 1983).

⁹ See e.g., Cal. Educ. Code § 48909 (West 1978); Conn. Gen. Stat. Ann. § 10-233g(b) (West Supp. 1983); Hawaii Rev. Stat. § 296-71 (Supp. 1982); Ill. Ann. Stat. ch. 122 § 10-21.7 (Smith-Hurd Supp. 1982); Tenn. Code Ann. § 49-9-410.

ing the institution, respectively. R.I. Gen. Laws 11-21-2 (1981).

The fact that school personnel are state employees, and act with state authority to implement state laws and regulations governing education, compels the conclusion that they are governmental agents rather than private citizens for Fourth Amendment purposes.

1. The Doctrine Of *In Loco Parentis* Does Not Support The Conclusion That A Search Conducted By School Personnel Is Private Rather Than Governmental Action

As petitioner correctly notes [Brief of Petitioner at 8, n. 3], a few state courts have held that school authorities stand *in loco parentis* to students, and as would be the case with parents, their conduct constitutes private rather than governmental action for Fourth Amendment purposes. See *In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (D. Ct. App. 1970); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (D. Ct. App. 1969); *People v. Stewart*, 63 Misc. 2d 601, 313 N.Y.S. 2d 253 (N.Y. Crim. Ct. 1970); *Commonwealth v. Dingfelt*, 227 Pa. Super. 380, 323 A. 2d 145 (Super. Ct. 1974); *Mercer v. State*, 450 S.W. 2d 715 (Tex. Civ. App. 1970).¹⁰ This holding has not been adopted by the great majority of lower courts which have considered this question [See Point IIA, Note 5, *supra*], and is, in the context of our contemporary system of public education, completely unfounded.

The advent of modern compulsory education laws has eroded the factual support which once existed for finding that educators stand *in loco parentis* to their students. See *e.g.*, *Horton v.*

¹⁰ In light of subsequent decisions finding school employees to be government agents for Fourth Amendment purposes, the continued validity of the California and New York cases referred to by petitioner is questionable. Compare *In re G.*, *supra* and *In re Donaldson*, *supra*, with *In re W.*, *supra* and *In re C.*, *supra*. Compare *People v. Stewart*, *supra* with *People v. Scott D.*, *supra* and *People v. Jackson*, *supra*.

Goose Creek Ind. School Dist., *supra* at 229-30; *D.R.C. v. State*, *supra* at 255. At common law, the *in loco parentis* power was based on two premises: The parent specifically delegated his authority to the teacher, and the authority so delegated was limited only to such restraint and correction as was necessary to carry out the educational purposes for which the teacher was employed. Blackstone, 1 *Commentaries* 453, as cited by *Reder* at 530. *D.R.C. v. State*, *supra* at 255. Under our present educational system, these conditions no longer exist.

It can hardly be said that parents have voluntarily delegated their authority to the school system. *Id.* Certainly teachers no longer act as agents of the parents, bound by the same parental concerns. *Id.* As the Supreme Court of New Jersey noted with regard to this aspect of the *in loco parentis* doctrine, "[j]udges and commentators have not failed to detect the irony of this analogy. They suggest that parents infrequently search their children and turn the evidence over to the police for prosecution." *State in the Interest of T.L.O.*, *supra* 463 A.2d at 938, n. 4. *Cf. In re Gault*, *supra* at 18. Moreover, modern teachers cannot exercise their disciplinary powers solely for the benefit of the individual child. *Reder*, *supra*; *D.R.C. v. State*, *supra*. Educators now have responsibility for safeguarding the entire student body, and the needs of the individual student may have to be sacrificed for the good of all *Id.*; *Buss* at 768.

This Court has, in other contexts, recognized that educators do not function as parent substitutes. *Tinker v. Des Moines*

¹¹ The *in loco parentis* approach to the evaluation of school searches has also been severely criticized by commentators. See e.g., *The Torturable Class*, *supra* at 714; *Buss*, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L.Rev. 739, 768 (1974) (hereinafter *Buss*); Trosch, Williams and DeVore, *Public School Searches and the Fourth Amendment*, 5 J.L. & Educ. 41, 53 (1982); *Reder*, *School Officials' Authority to Search is Augmented by the In Loco Parentis Doctrine*, 5 Fla. St. U.L. Rev. 526, 531 (1977) (hereinafter *Reder*); Comment, *Students and the Fourth Amendment: Myth or Reality?* 45 U.M.K.C. L.Rev. 282, 296-97 (1977).

Ind. School Dist., *supra* at 507; *Ingraham v. Wright*, 430 U.S. 651 (1977); *West Virginia Bd. of Ed. v. Barnette*, *supra* at 637. It has been held that the authority possessed by the school, to prescribe and enforce standards of conduct is, unlike that of the parents, limited and "must be exercised consistently with other constitutional rights." *Goss v. Lopez*, *supra* at 574; *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, *supra*; *Ingraham v. Wright*, *supra*.

The realities of contemporary public education compel the same conclusion in the instant matter. "What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such it should be subjected to law enforcement rules." *Buss* at 768. See also, *Picha v. Wielgos*, *supra* at 1218; *Jones v. Latexo Ind. School Dist.*, *supra*; *State v. Baccino*, *supra*. As most lower courts have found, educators act as agents of the government, not of the parents of their students, and as such their conduct is subject to the Fourth Amendment. See note 5, *supra*.

B. The Exclusionary Rule Is Constitutionally Mandatory When The State Intends To Utilize Illegally Seized Evidence On Its Case-In-Chief In A Criminal Matter

Petitioner maintains that even if school personnel are governmental agents bound by Fourth Amendment principles, the exclusionary rule need not be applied when these principles are violated.¹² Of the many lower federal and state courts, previ-

¹² *Amicus* New Jersey School Boards Association urges this Court to adopt a "good faith" exception to the exclusionary rule in the context of searches by school officials, an argument that was "not pressed or passed upon" in any court below. (*Amicus* Brief at 21-29). In *Illinois v. Gates*, ___ U.S. ___, 103 S.Ct. 2317 (1983), this Court refused to decide this precise issue, noting that because it had not been raised below, the factual record was likely to be inadequate. *Id.* at 2323. In addition, "due regard for the appropriate relationship of

ously cited, which have considered the school search issue, very few have adopted this approach. See *United States v. Coles, supra*; *Keene v. Rodgers, supra*; *D.R.C. v. State, supra*; *State v. Young, supra*; *State v. Wingerd, supra*. Nevertheless, petitioner argues that this minority view is consonant with the Fourth Amendment, and urges this Court to so hold.

The nature and purpose of the exclusionary rule have recently been the subject of some debate. Early decisions treated the rule as a constitutionally-mandated remedy for all Fourth Amendment violations. *Weeks v. United States*, 232 U.S. 383 (1941); *Mapp v. Ohio*, 367 U.S. 643 (1961). As petitioner correctly notes, beginning with *United States v. Calandra*, 414 U.S. 338, 349 (1974), this Court has taken a somewhat different view, focusing primarily on the deterrent effect of the exclusionary rule, and applying it in "those areas where its remedial objectives are thought most efficaciously served." See also *Stone v. Powell*, 428 U.S. 465, 486-87 (1976). Based upon this change of emphasis, petitioner asserts that the exclusionary rule need only be applied when the benefits of deterrence are equal to, or outweighed by the costs to society inherent in excluding relevant evidence of criminal conduct. (Brief of Petitioner at 14).

However, those cases, cited by petitioner in support of this contention, where implementation of the rule has been restricted involve only limited peripheral uses of the illegally

this Court to the state courts" required that the latter be given the first opportunity to rule on the question. *Id.* As the instant record is devoid of any facts pertaining to the good faith of the searching official, and as the New Jersey courts have been denied the opportunity to first rule on the question, the issue cannot be properly considered here. Moreover, since the standard governing school searches was well established in New Jersey at the time of the present incident, it is unlikely that objective good faith could be established. See *State in the Interest of G.C.*, 121 N.J. Super. 108, 296 A.2d 102 (J.D.R.C. 1972).

obtained evidence.¹³ In these unusual circumstances, it was determined that suppression of the evidence would have so little deterrent effect that the costs of enforcing the exclusionary rule would outweigh the benefits. None entailed, as is true in the instant matter, the introduction of the illegally obtained evidence on the State's case-in-chief at a criminal proceeding.¹⁴

This Court has never undermined this core deterrent function of the rule; "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *United States v. Calandra*, *supra* at 349. Indeed, in *United States v. Calandra*,

¹³ See e.g., *United States v. Calandra*, *supra* (use of illegally obtained evidence permitted at a grand jury proceeding); *Walder v. United States*, 347 U.S. 62 (1954), and *United States v. Havens*, 446 U.S. 620 (1980) (prosecution allowed to use illegally obtained evidence to impeach credibility when defendant testified falsely at trial); *United States v. Janis*, 428 U.S. 433 (1976) (evidence secured illegally by state police admissible in civil suit brought by federal authorities to collect unreported taxes); *Stone v. Powell*, *supra* (refusal to consider on federal *habeas corpus* proceeding the failure of a state court on direct appeal to suppress evidence illegally obtained).

¹⁴ Petitioner argues that juvenile delinquency proceedings are rehabilitative rather than criminal in nature, and that implementation of the exclusionary rule would frustrate this "ameliorative purpose." (Petitioner's Brief at 15, n. 9) However, this Court long ago rejected the contention that benevolent motivations could justify depriving juveniles of constitutional rights. *In re Gault*, *supra* at 18-19. "[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts"; a proceeding in which a juvenile could lose his liberty for years is the functional equivalent of a felony prosecution. *In re Winship*, *supra* at 367. Furthermore, many secondary school students are prosecuted criminally, either because they are legally adults or are subject to one of the various state statutes which allow prosecutors to try older juveniles as adults. See e.g., *State v. Engerud*, 94 N.J. 331, 463 A.2d 934, 938 (1983).

Justice Powell, writing for the Court, reaffirmed the basic principle that evidence secured illegally "cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *Id.* at 347. Similarly, in *Stone v. Powell*, *supra* at 493-94, while declining to enforce the exclusionary rule on collateral review, Justice Powell once again emphasized the view that it must continue to be implemented at trial and on direct appeal. Cf. *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579 (1982).

In determining whether the exclusionary rule was applicable in a school disciplinary proceeding, the District Court of the Western District of Michigan noted that the decision in *Calandra* "was premised upon the availability of an exclusionary rule applicable to the authorities' case in chief . . ." *Smyth v. Lubbers*, *supra* at 794.

Moreover, the fact that the search at issue was conducted by other than a police officer has not produced a different result. Petitioner's assertions to the contrary notwithstanding, this Court has never confined the exclusionary rule to searches conducted by law enforcement officers. "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal law or breaches of other statutory or regulatory standards." *Marshall v. Barlow's Inc.*, *supra* at 313. The exclusionary rule has been specifically applied to such non-police governmental officials as firemen [*Michigan v. Clifford*, *supra*]; alcohol tax agents [*Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)]; border patrol officers [*United States v. Martinez-Fuerte*, *supra*].

The above governmental officers are not primarily concerned with the enforcement of criminal law. They are responsible for carrying out various statutory and regulatory schemes to promote health, safety, etc. Occasionally, as a result of the performance of their duties, non-criminal sanctions are imposed upon a violator; even more infrequently they discover evidence which results in a criminal prosecution.

Nevertheless, the exclusionary rule has been applied when their conduct in pursuit of their official responsibilities has been adjudged unreasonable by Fourth Amendment standards.

Similarly, school employees are charged with the responsibility of carrying out the legislative and administrative schemes formulated to promote public education. The enforcement of these regulations can result in the imposition of such quasi-criminal sanctions as suspension and expulsion upon student-violators; it can also result in the discovery of evidence upon which criminal charges are founded. As is the case with other governmental agents, the exclusionary rule is applicable when they exceed their authority.

Thus when, as in the instant case, the state attempts to utilize the fruits of an illegal search on its case-in-chief, the "cost-benefit" analysis proposed by appellant has no application. The exclusionary rule is constitutionally mandated even when the illegal search was conducted by government agents other than police officers.

C. Assuming *Arguendo* That The "Cost-Benefit" Test Proposed By Petitioner Is Appropriate In The Instant Case, Application Of The Exclusionary Rule Would Still Be Mandated Since The Expected Deterrence Benefits Would Outweigh Any Anticipated Detriments

Even assuming for the purposes of argument, that the "cost-benefit" approach were appropriate in this case, it is clear that the balance would weigh heavily in favor of the application of the exclusionary rule. The expected benefits with regard to the deterrence of conduct in violation of the Fourth Amendment would outweigh any anticipated detriments.

1. Application Of The Exclusionary Rule To School Searches Would Deter Violations Of The Fourth Amendment Because School Officials Have A Strong Interest In Seeing Criminal Actions Against Students Successfully Litigated

Application of the exclusionary rule to searches of students would substantially deter conduct in violation of the Fourth Amendment because school administrators do, contrary to petitioner's contentions, have a strong interest in seeing juvenile delinquency proceedings successfully litigated.¹⁵ Certainly, the primary concern of school administrators and teachers is education, not law enforcement. However, it has also been universally recognized that educators have an obligation to maintain a safe and orderly environment for the benefit of all students. *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, *supra* at 507; *Doe v. Renfrew*, *supra*, 475 F. Supp. at 1020; *Moore v. Student Affairs Comm. of Troy State University*, 284 F. Supp. 725, 729 (M.D. Ala. 1968); 3 LaFave, *Search and Seizure*, 10.11 at 458 (1978).

As previously noted, in most states, educators have statutorily imposed duties to maintain orderly conditions in the school, or to hold students strictly accountable for disorderly

¹⁵ Petitioner also makes the surprising assertion that because school authorities infrequently conduct searches, they cannot be expected to learn the basic rules governing search and seizure, or to moderate their conduct accordingly. (Petitioner's Brief at 16). Initially, it is difficult to understand why, if school searches occur so infrequently, petitioner insists that they are indispensable to the maintenance of a safe and orderly educational environment.

In any event, there is no legal support for the position that individuals can be held accountable only for those laws with which they have day to day contact. Furthermore, teachers as a group are well-educated and academically talented. Familiarizing them with basic Fourth Amendment principles would certainly present no serious difficulties. Indeed many educators are themselves responsible for teaching constitutional principles to their own students through history and civics courses.

conduct; in some, educators are even obliged to seek out and report to the police evidence of criminal conduct. See Notes 7, 8, and 9, *supra*. These obligations would, at a minimum, concern teachers with the enforcement of school regulations that further these ends and with the elimination of anti-social conduct which in addition to violating school regulations also contravenes criminal law.

In light of these responsibilities, it is manifest that teachers and other school officials have, in addition to their educational functions, substantial regulatory and law enforcement duties. Educators who fail to successfully carry out these duties would be evaluated accordingly by their superiors, and might personally suffer such detriments as loss of job or of promotions.

To comply with these mandates, it would be necessary that anti-social or disruptive conduct be prevented or immediately abated. While these ends may on occasion be achieved through internal disciplinary procedures, the more drastic measure of arrest, trial and conviction in the juvenile justice system would often "solve" the discipline problem with a minimum of effort on the part of the school system. For example, a successful juvenile prosecution could result, by mean of a reformatory or other custodial disposition, in the removal of the disruptive student from the school environment entirely. Or the student and his family could be compelled, as a condition of probation, to submit to psychiatric or other remedial counselling which they might not otherwise have been willing to seek.

In many states, the fact of a juvenile delinquency adjudication is *per se* grounds for suspension or expulsion.¹⁶ In other states, ground for expulsion or suspension include engaging in

¹⁶ See e.g., Alaska Stat. § 14.30.045 (1982); Kan. Stat. Ann. § 72-8901 (1980); La. Rev. Stat. Ann. § 17:416 (West 1983); Mich. Comp. Laws. Ann. § 380.1311 (West Supp. 1981); Nev. Rev. Stat. § 115-391 (Supp. 1981).

activity forbidden by the penal code.¹⁷ While such statutes may still necessitate the holding of some minimal due process hearing, certainly the fact of a juvenile delinquency adjudication would reduce the school's burden of proof to the production of a court document. The school system could thereby impose its own sanctions with a minimum of effort on its part.

Thus, school officials have a very direct interest in seeing juvenile prosecutions successfully concluded, and would therefore be deterred by the knowledge that illegally conducted searches will result in suppression of the evidence found. Certainly their interest is as strong as that of other regulatory, as opposed to law enforcement, agents to whom the exclusionary rule has already been applied.

Admittedly, building inspectors, revenue agents, firemen, like teachers, are not police officers, and do not primarily carry out searches with criminal law enforcement goals in mind. This difference has always been recognized by this Court and implemented not by elimination of the exclusionary sanction, but by adapting the conditions under which these species of search can be conducted. In so doing, the governmental interest which justifies the search has been balanced against the constitutionally protected interests of the citizen, and the nature and extent of the intrusion was appropriately limited. *Camara v. Municipal Court*, *supra* at 534-35. Thus, certain classes of administrative search have been authorized on the basis of standards less than probable cause. *Michigan v. Tyler*, *supra* at 507, n. 5. In some circumstances, the requirement of a warrant has been eliminated. *See e.g., United States v. Martinez-Fuerte*, *supra* at 566-67. *See also Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁷ *See e.g.,* Ind. Code Ann. § 20-8.1-5-4 (Burns Supp. 1983); Me. Rev. Stat. Ann. Tit. 20-A § 1001 (Supp. 1983); Neb. Rev. Stat. § 79-4, 180 (Supp. 1983); S.C. Code Ann. § 59-63-210 (Law Co-op. 1976).

This was the identical approach taken by the Supreme Court of New Jersey in the opinion below.¹⁸ *State in the Interest of T.L.O.*, *supra* at 941-42. After considering such governmental concerns as the duty of educators to maintain order, safety, and discipline in the schools, the necessity of creating a proper

¹⁸ Since the New Jersey Supreme Court found the search in this case to be invalid even under the reasonable grounds test and petitioner has not challenged the propriety of this finding, the question of the proper standard to be applied is not strictly at issue here. Respondent argued below and still maintains that the diluted "reasonable grounds" standard is not constitutionally permissible in this case. While the administrative search analogy may have some validity when applied to inanimate objects such as lockers, it breaks down completely when, as here, the person of a child is the subject of a significant intrusion on privacy and dignity. *Horton v. Goose Creek Ind. School Dist.*, *supra* at 477. In creating the few, narrowly defined exceptions to the warrant-probable cause requirement, this Court has balanced the governmental interests at issue against the nature of the intrusion. *Terry v. Ohio*, *supra* at 20-31 (1968); *Camara v. Municipal Court*, *supra* at 536-37. Thus, the lesser standard was authorized for administrative searches because these inspections are not aimed at the discovery of crime, are not personal in nature, and entail a rather limited invasion of a citizen's privacy. *Camara v. Municipal Court*, *supra* at 535-37. Similarly, the frisk exception is allowed because the intrusion is limited to a "pat-down" for the discovery of weapons, when an officer reasonably believes that his safety is threatened. *Terry v. Ohio*, *supra* at 28-29.

However in the school setting, the lesser standard has been applied not only to searches related to school rule violations, but also for evidence of crime. Clearly, the probable cause standard cannot be diluted in these circumstances. See *Id.* at 20-21; *Camara v. Municipal Court*, *supra* at 535; *State v. McKinnon*, *supra* at 787 (dissent of Rosellini, A.J.). *State v. Young*, *supra*, 216 S.E. 2d at 599 (Gunter J., dissenting).

Moreover if a school rule infraction is to be validly analogized to a regulatory code violation, the scope of the search permitted should be similarly limited. Nevertheless, in the school context full body searches have been authorized not merely "a limited intrusion of the kind

educational atmosphere, the fact that educators are not primarily concerned with law enforcement, and the necessity for immediate action when threats to the educational environment arise, the New Jersey Supreme Court ruled that a warrant need not be procured, and that a search can validly be conducted if the teacher has reasonable grounds to believe that the student possesses evidence of illegal activity or of activity that would interfere with school discipline and order. *Id.* at 941-42.

The majority of lower federal and state courts, which have considered this issue have taken the same approach, dispensing with the warrant requirement and permitting searches upon a lesser standard akin to that formulated by the New Jersey Supreme Court.¹⁹ By contrast, where the search of the

associated with the relaxed standards of reasonableness in *Camara* and *Terry*." *State v. Young*, *supra* at 600. Furthermore, school attendance is compulsory. Unlike the citizen who has entered a highly regulated business, who has purchased an airline ticket, or who intends to cross an international border, it cannot be said that a student has surrendered his reasonable expectation of privacy by voluntarily placing himself in a situation where an administrative inspection is inevitable. See *Jones v. Latexo Ind. School Dist.*, *supra* at 234. Thus the administrative search analogy is not viable.

Admittedly, few courts have adopted the traditional probable cause standard when a search has been conducted by school personnel. *State v. Mora*, *supra*. See also *M. M. v. Anker*, *supra* at 589; *State v. Young*, *supra*, at 594 (Gunter, J., dissenting); *State v. McKinnon*, *supra*, 558 P.2d at 785 (Rosellini, A.J., dissenting). Respondent nevertheless submits that the dilution of the probable cause-warrant standard in the school context is in violation of the Constitution.

¹⁹ See e.g., *Horton v. Goose Creek Ind. School Dist.*, *supra*; *M. M. v. Anker*, *supra*; *Jones v. Latexo Ind. School Dist.*, *supra*; *Bilbrey v. Brown*, *supra*; *Bellnier v. Lund*, *supra*; *Doe v. Renfrew*, *supra*; *M. v. Board of Education Ball-Chatham, etc. Dist. No. 5*, *supra*; *In re W*, *supra*; *In re C.*, *supra*; *State v. Baccino*, *supra*; *State v. F.W.E.*,

student was conducted by the police rather than school employees, courts have consistently imposed the probable cause test.²⁰

In concluding that this approach was adequate to protect both the legitimate interests of the state and the privacy rights of the students, these courts considered many of the same factors as were noted by the court in *State in the Interest of T.L.O.*, *supra*, as well as others which arise in the school search context. See e.g., *In the Interest of J.A.*, *supra* at 962 (the health and welfare of the students in the school's charge); *Jones v. Latexo Ind. School Dist.*, *supra* at 236 ("the unique role of education in our society"); *State v. Baccino*, *supra* at 871, and *People v. Jackson*, *supra*, 319 N.Y.S. 2d at 734-35 (the *in loco parentis* relationship between teacher and student); *Doe v. State*, *supra*, 540 P.2d at 830 (the "epidemic" of crime in the schools); *People v. Scott D.*, *supra* at 406-08 (the "lethal" threat of drug abuse on the increase in schools; the immaturity of students). Thus the difference in the nature of the search has already been balanced and accommodated by the use of a standard less than probable cause; further amelioration by dispensing with the exclusionary rule would reduce the Fourth Amendment protection to an empty shell.

supra; *People v. Ward*, *supra*; *Doe v. State*, *supra*; *State in the Interest of T.L.O.*, *supra*; *People v. Singletary*, *supra*; *People v. D.*, *supra*; *People v. Jackson*, *supra*; *State v. McKinnon*, *supra*; *In re L.L.* *supra*.

²⁰ See e.g., *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971); *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D. Ill. 1975); *Waters v. United States*, 311 A.2d 385 (D.C. App. 1973); *M. J. v. State*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981); *People v. Bowers*, 72 Misc. 2d 800, 339 N.Y.S. 2d 783 (N.Y.C. Crim. Ct. 1973), *aff'd* 77 Misc. 2d 697, 356 N.Y.S. 2d 432 (1974).

2. Application Of The Exclusionary Rule To Evidence Seized Illegally By School Employees Would Deter Misconduct On The Part Of The Police

In addition to deterring Fourth Amendment violations by school personnel, application of the exclusionary rule to the school setting will also prevent misconduct on the part of the police. If evidence improperly obtained through a school search could nevertheless be admitted into evidence in juvenile delinquency or adult criminal proceedings, there would be a natural temptation for the police to instigate teachers to make searches which would be illegal for both police and school personnel. Moreover, this type of covert cooperation would be difficult to detect and impossible to prove.

That such would be the inevitable result of an inconsistent use of the exclusionary rule was recognized by this Court in an analogous setting in *Elkins v. United States*, 364 U.S. 206 (1960). In abolishing the "silver platter" doctrine, under which evidence illegally seized by state law enforcement authorities was still admissible in federal prosecutions, Justice Stewart wrote:

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. *Id.* at 221-222.

Similarly by applying the exclusionary rule uniformly to evidence illegally obtained from students, whether seized by the police or by teachers, one strong incentive to conduct illegal searches would be eliminated. In deciding that the exclusionary rule must be extended to circumstances where evidence seized by a teacher is turned over to the police, the

Wisconsin Court of Appeals in *Interest of L.L.*, *supra* at 347, n. 1, agreed that

Once the evidence comes into the possession of law enforcement officers and is used in court proceedings against the liberty interests of the person searched, the exclusionary rule must be available to deter prosecutions based on unlawful searches. Without such exclusions, school personnel and other government employees would become the same sort of bypass around the amendment's protections that the Court meant to close by extending the exclusionary rule to state court proceedings in *Mapp v. Ohio*, *supra*.

Petitioner suggests that should school authorities conduct illegal searches at the behest of the police, the courts will recognize that fact and can then apply the exclusionary rule to suppress any fruits of that search. (Brief of Petitioner at 16-17) This optimistic proposal ignores reality. It was the fact that such subterfuge was virtually impossible to detect that prompted the decision in *Elkins v. United States*, *supra*. Only the enforcement of a uniform standard pursuant to which both the police and the school authorities would be sanctioned by exclusion of evidence illegally obtained would a resurrection of the "silver platter" doctrine be avoided.

Significantly, petitioner does not challenge the efficacy of the exclusionary rule with regard to the police. However, as *amicus curiae*, the Washington Legal Foundation suggests, based upon the research embodied in Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970) (hereinafter *Oaks*), and Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. of Leg. Stud. 243 (1973) (hereinafter *Spiotto*) that the exclusionary rule does not deter police misconduct. (See *Amicus* Brief at 9, n. 3). This assertion is wholly unwarranted for several reasons, not the least of which is Prof. Oaks' own belief that his findings proved to be inconclusive. *Oaks* at 755.

Oaks studied arrests for narcotics, weapons, gambling and stolen property in Cincinnati, reasoning that if the exclusionary

ry rule was deterring unlawful conduct, the number of arrests for these crimes (which generally required evidence to be seized) would decline subsequent to the *Mapp* decision. Spiotto likewise confined his study to a single city, Chicago, but focused upon the number and success of motions to suppress filed in felony cases in the trial courts. These before and after evaluations are beset with inherent weaknesses.

First, the studies centered upon a single city. As the police response in Chicago and Cincinnati can hardly be characterized as typical, these studies failed to examine an adequate or representative sample. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against A Precipitous Conclusion*, 62 Kty. L. J. 681, 698, 702, 704, 720-22 (1974) (Hereinafter *Canon*). The whole notion of analyzing statistics on suppression motions as an indicator of police compliance is of questionable validity. Such a study cannot account for (1) the numerous cases that are discretionally screened out of the system by police and prosecutors who are mindful of the inevitable success of a suppression motion, (2) the fact that illegal searches which do not uncover incriminating evidence never come before judicial scrutiny, and (3) the effect of population growth and social changes (increasing drug use) upon the crime rate. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W. L. Rev. 740, 744 (1974) (hereinafter *Critique*); *Canon* at 718.

Additionally, as the decision in *Mapp* only forbade the introduction of illegally obtained evidence, but left the definition of such to be determined over a decade later in piecemeal pronouncements, the *Mapp* decision cannot be considered a singular concrete event such that findings as to police misconduct beforehand would be relevant to those afterward. *Canon* at 700-01. Furthermore, the Spiotto study is subject to individual criticisms, the most glaring of which is the researcher's mistaken belief that *Mapp* imposed the exclusionary rule in Illinois, when in fact the state had adopted it pursuant to state law in 1924. *Critique* at 754.

Indeed a more credible empirical study on the exclusionary rule indicates that it does in fact deter police misconduct. Based upon information from 19 cities, Prof. Canon observed a dramatic decrease in the number of arrests for "search and seizure sensitive" crimes after *Mapp* in approximately half of those cities; a substantial increase in the number of search warrants obtained; and the wide-spread adoption by police departments of policies designed to implement the *Mapp* decision. He concluded that "the exclusionary rule can and does have a very real, although hardly universal, deterrent effect on the police." Canon, *The Exclusionary Rule: Have Critics Proven that It Doesn't Deter Police?*, 62 *Judicature* 398, 400 (1979).

The application of the exclusionary rule to illegal school searches would, then, serve a second deterrent purpose by preventing misconduct on the part of the police.

3. The Societal Costs Of Implementing The Exclusionary Rule Are Insubstantial

Petitioner argues that enforcing the exclusionary rule would impose "a stiff societal cost" in that the prosecution would lose the use of evidence that would otherwise be probative and reliable. (Petitioner's Brief at 19) At the outset, it must be emphasized that the enforcement of a host of constitutional rights entails the same cost. The remedy for a denial of the Sixth Amendment's right to a speedy trial is the dismissal of the indictment, despite the fact that the prosecution may have overwhelming evidence, untainted by the constitutional violation, of the defendant's guilt. See *Barker v. Wingo*, 407 U.S. 514 (1972). Confessions taken in violation of the Fifth Amendment are excluded, even when circumstances demonstrate that the statement is trustworthy. See *Watts v. Indiana*, 338 U.S. 49, 50, n. 2 (1949); *Spano v. New York*, 360 U.S. 315, 320-21 (1959). Nullification is the most frequently imposed sanction for constitutional violations. Dellinger, *Of rights and Remedies: The Constitution as a Sword*, 85 *Harv. L. Rev.* 1532

(1972). As the New Jersey Supreme Court noted below, "law enforcement would be easier without the Constitution, but that is not the way the Framers chose." *State in the Interest of T.L.O.*, *supra* at 942.

In the Fourth Amendment context, the cost is for the prosecution to do without evidence it would never have had if constitutional principles had been respected. The State is still free to continue the case based upon any other evidence it may have, independent of the illegal search. This is a far less stringent sanction than is required for a speedy trial violation where the entire prosecution is terminated.

Furthermore, empirical evidence shows that enforcement of the rule results in the dismissal of only a small minority of prosecutions. Studies have demonstrated that a low percentage of all complaints are rejected by prosecutors because of search and seizure problems. According to the independent Government General Accounting Office study of 2,804 cases handled by thirty-eight United States Attorney's Offices in 1978, search problems accounted for only 0.4% of the arrests declined for prosecution. Evidence was suppressed in only 1.3% of the cases actually filed, half of which still terminated in convictions. Comp. Gen. Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Prosecutors*, 11, 13, 14 (1979).

Data developed in a recent study by the Department of Justice is consistent with the Government Accounting Office report. The study considered the effect of the exclusionary rule in state criminal prosecutions in California over a three year period. Presented by police with 520,993 felony cases, prosecutors rejected 86,033 (16.5%), only 4,130 of which (0.8% of the total arrests) were rejected for search problems. National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California 1* (1982). A study of 7,500 felony prosecutions in Pennsylvania, Michigan, and Illinois found that suppression motions were filed in only 5% of the cases, and granted in only 0.7%. Nardilli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 Am. B. Found. Re-

search J. 3. See also Canon, *Ideology and Reality in Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. Tex. L. Rev. 559, 573-76 (1982); Davies, *Do Criminal Due Process Principles Make A Difference?* 1982 Am. B. Found. Research J. 247, 265.

In light of these findings, it can hardly be said that the cost to society in terms of "lost" convictions is substantial. Petitioner asserts that implementation of the exclusionary rule in the school context would exact an additional cost by deterring school authorities from taking effective action to provide a crime-free environment for learning. (Petitioner's Brief at 19) The National School Boards Association maintains that schools are being confronted with a "rising tide" of crime and that searches are a "vital tool" to combat this problem. (Brief of *Amicus Curiae* at 5). These contentions are without support.

At the outset, it appears necessary to emphasize that the holding of the New Jersey Supreme Court does not preclude school authorities from conducting searches. It merely requires that there be some reasonable grounds for doing so.

Moreover, surveys done at both the national and local levels have concluded that the incidence of crimes committed in schools by students has been on the decline since the mid-1970's. National Institute of Education (D.H.E.W.), *Violent Schools—Safe Schools: The Safe School Study Report to the Congress*, 2 (1978), ERIC #ED-175-112 (hereinafter *The Safe School Report*); L.E.A.A. National Institute of Law Enforcement and Criminal Justice, *School Crime: The Problem and Some Attempted Solutions*, 3-4 (1980), ERIC #ED-180-103 (hereinafter, *School Crime*); New Jersey Department of Education, *Final Report on the Statewide Assessment of Incidents of Violence, Vandalism and Drug Abuse in the Public Schools*, 57 (1982) (hereinafter, *New Jersey Final Report*); ERIC Clearinghouse on Educational Management/National School Boards Association, *Research Action Brief*, 2-3 (1982), ERIC

#ED-208-453 (hereinafter, *Research Action Brief*).²¹ With regard to drug abuse, a recent study prepared for the National Institute on Drug Abuse by the University of Michigan's Institute for Social Research concluded that "the 1980's represent a period of leveling and decline in drug use" among high school students. N.Y. Times, Feb. 7, 1984 at C9, col. 2 (city ed.).

The Safe School Study concluded that only 8% of the nation's school were experiencing a serious crime problem. *The Safe School Report* at 2. Some researchers feel that 4% is more accurate estimate. *Research Action Brief* at 3. While these studies conclude that problems with school exist and must be addressed, the findings suggest that schools are "not the hotbed of crime and violence" that petitioner asserts. *Research Action Brief* at 3., *School Crime* at 3.

In addition, there does not appear to be any reason to believe that the rate of crime is related to the ability of school personnel to conduct searches. For example, the Safe School Study identified a number of factors consistently found in schools with a high incidence of violence: High crime rate in the school's attendance area; higher proportion of male than female students attending; junior high school age level; large school population; lack of firmness in enforcing school rules; large class size; lack of relevance of academic courses to students; students' feelings that they have little control over what happens

²¹ In evaluating the findings of the reports cited herein it should be noted that they also include statistics on categories of crimes, such as vandalism, fighting, assault and arson, with which the use of a search is not normally associated. For example, the *New Jersey Final Report* indicates that between July of 1979 and June of 1981, the state's school districts reported 15,036 incidents of vandalism, 3,975 incidents of violence, and 2,212 incidents of drug abuse. *Id.* at 4. It would appear obvious that the most serious problem faced by the New Jersey schools over this period was vandalism, by an overwhelming margin. The utility of student searches to cope with this type of crime is doubtful.

to them. *The Safe School Report* at 8. As to property crimes, the study isolated these factors: High crime rate in the attendance area; high residential concentration near school premises; presence of non-student youth around school premises; unstable family conditions; large school size; lax rule enforcement; lack of coordination between faculty and administration; hostile and authoritarian attitudes on the part of teachers toward students; low student identification with teachers as role models; manipulation of grades as a disciplinary measure; intense competition for grades; intense competition for student leadership positions. *Id.* Many of these same problem areas have been identified by other studies. See e.g. Governor's (Mich.) Task Force, *School Violence and Vandalism Report* (1979), ERIC #ED-191-946 (hereinafter *Michigan Report*); *New Jersey Final Report* at 57; California State Department of Education, *Preliminary Report on Crime and Violence in the Public Schools* (1981), ERIC #ED-208-567; New Jersey School Boards Association, *School Violence Survey* (1977), cited in *Research Action Brief* at 3.

None of these studies found the infrequency of student searches to be a significant factor in schools with a serious crime problem. Moreover, of the many remedial measures proposed by these studies to reduce the existing crime rate, none involved increasing the intensity of student searches. On the contrary, the findings would seem to suggest that several of the conditions which are associated with a high crime rate could actually be exacerbated by an increase in the number of searches conducted, and by the failure to stringently penalize school personnel who conduct unreasonable searches.

The Safe School Study concluded that the incidence of crime is high in schools where "students feel they have little control over what happens to them," and where there are "authoritarian attitudes on the part of teachers toward students." *The Safe School Report* at 8. See also *The Michigan Report* at 10. It was found that "fairness in the administration of discipline and respect for students is a key element in the effective governance of schools," and that "close personal ties between teachers

and students" lower the risks of criminal conduct. *The Safe School Report* at 9. See also Clark, *Violence in Public Schools: The Problem and Its Solutions*, 8 (1978), ERIC #ED-151-990. Frequent searches of students, particularly where no reasonable basis exists justify the search, will not engender respect between educators and students, and will only increase the students' perception that they have no control over what happens to them. Failure to stringently sanction teachers who conduct illegal searches will only persuade students that enforcement of rules is inconsistent and unfair, and that adults are privileged to flout the rules with impunity.

It has been recognized that children have a greater need for protection against invasions of privacy than adults, and are more likely to suffer psychological damage when subjected to involuntary searches. *People v. Scott, D.*, *supra*, 34 N.Y. 2d at 490; *Jones v. Latexo Ind. School Dist.*, *supra* at 233-34; *Bellnier v. Lund*, *supra* at 53. As one commentator noted;

This possibility of harm is even more ominous since the innocent as well as the guilty suffer from unreasonable searches. One example of this is the case in which an entire fifth grade class was strip searched after one student told the teacher three dollars were missing from a coat pocket [See *Bellnier v. Lund*, *supra*]. The indignity and trauma created by the search was fruitless; no money was found. *The Torturable Class* at 731.

In light of these circumstances, the societal costs of applying the exclusionary rule in the school context will not outweigh the deterrence benefits.

D. Failure To Apply The Exclusionary Rule To Searches By School Personnel Would Leave Students With No Adequate Means Of Preventing Violations Of Their Fourth Amendment Rights

The Fourth Amendment merely defines the right of the people to be free of unreasonable searches and seizures. It is not self-executing. Some means must be devised by the courts to effectuate its guarantees, since it is manifest that a right without a remedy has no substance. *Mapp v. Ohio*, *supra* at

655. In the years between 1949 when *Wolf v. Colorado*, *supra*, applied the Fourth Amendment, but not the exclusionary rule to the states, and 1962, when *Mapp* made the exclusionary rule mandatory, the states were free to develop and implement any alternative remedies that would adequately protect the Fourth Amendment rights of its citizens. It was the failure of the states to do so that led to the decision to require application of the rule.²² *Mapp v. Ohio*, *supra* at 651-52. The inability or unwillingness of the states to devise an alternative suggests that no adequate substitute could be formulated, and that the exclusionary rule, with whatever its attendant problems, was found to be the most effective means available.

Petitioner nevertheless suggests, as alternatives, the bringing of civil suits against the offending school employee, and/or the use of internal disciplinary sanctions by the school system itself. (Petitioner's Brief at 17-18). These procedures have been found to be wholly inadequate with regard to the police, and petitioner has demonstrated no basis to conclude that they would be more successful in the school context.

1. Civil Suits Against School Employees Who Conduct Illegal Searches Would Have Inadequate Deterrent Effect

The alternative of a civil suit against the offending officer has long been recognized as an inadequate substitute for the exclusionary rule with regard to deterring police misconduct. *Elkins v. United States*, *supra* at 220. In his dissent to *Wolf v. Colorado*, 338 U.S. 25, 42-43 (1949), Justice Murphy recognized that the traditional tort action presented so many difficulties in the search and seizure context that it would rarely be successful, and would therefore have little deterrent effect. In some jurisdictions, no such cause of action would exist unless

²² Prior to the *Mapp* decision, 26 states had voluntarily adopted the exclusionary rule as the required method of deterring Fourth Amendment violations. See *Elkins v. United States*, *supra*, Appendix Table I.

physical harm could be demonstrated, and in any event the measure of damages would be the extent of the injury.²² *Id.* To obtain punitive damages, malice must be proved, and the resulting award may be only nominal. *Id.* In the event of victory, the plaintiff may have difficulty in collecting damages from frequently "judgment-proof" officers. *Id.* at 44.

The possible federal remedies present a substantial barrier in the form of a qualified immunity available to government officials as defenses when they have acted in "good faith." See e.g., *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); 42 U.S.C. § 1983. Moreover, it has been found that in this type of action, juries tend to focus upon the officer's belief in the legality of his conduct, and ignore the question of whether his belief was reasonable. Theis, *Good Faith as a Defense to Suits for Police Deprivation of Individual Rights*, 59 Minn. L. Rev. 991, 1009-12 (1975); Comment, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 Temp. L.Q. 938, 951-953 (1976).

A number of other factors have also been recognized as rendering the civil alternative ineffective. Fear of reprisals from the police and prosecutorial agencies discourages both plaintiffs and their attorneys from bringing such suits. Amsterdam, *Prospectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 430 (1974). Plaintiffs also face the likelihood of jury prejudice in favor of the law enforcement officer, particularly if the plaintiff is himself a member of a minority group. Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 783, 800 (1979).

²² The absence of physical harm in suits alleging Fourth Amendment violations has resulted in low damage awards. Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789-90 (1979); Comment, *Presumed Damages for Fourth Amendment Violations*, 129 U.Pa. L. Rev. 192 (1980).

The cost of litigating such suits is prohibitive, and because of the dim prospects of success, the availability of contingent fee representation is unlikely. Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. Crim. L. and P.S. 1, 7 (1975). Moreover, many victims of unconstitutional searches are unaware that the officer's conduct was illegal and actionable. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W.U.L. Rev. 790, 793 (1974).

All of these practical problems, identified in the context of civil suits against the police would have equal application to suits against school officials. Families would be hesitant to bring such suits while their children were still students under the jurisdiction of the defendants. The fear, and the likelihood, of reprisals would be as great if not greater in the educational context than with the police.

Juries could be expected to have the same sympathies for educators as they have historically held for law enforcement personnel. The children, and as a practical matter, their parents, would still have to have substantial financial resources to conduct the civil litigations. *Smyth v. Lubbers*, *supra* at 794. The probability of collecting money damages from judgment-proof school employees would be no better than from police officers. Moreover, children are even less likely than adults to understand when their rights have been violated and to realize that they can seek redress.

Furthermore, teachers and school administrators also have a qualified immunity from damages for claims of constitutional violation stemming from their "good faith" actions. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Morales v. Grigel*, 422 F.Supp. 988, 1001 (D.N.H. 1976). Thus, in all but the most flagrant violations of a student's personal privacy, a teacher

could successfully defend on the grounds that though the search was illegal, he or she had acted in good faith.²⁴

These difficulties would, then, render the civil action an inadequate substitute for the exclusionary rule in the educational context. Certainly, the appellant has demonstrated no reason to assume that it would be any more effective a deterrent to illegal searches by teachers than it has been found to be to police officers. Indeed, after considering the difficulties inherent in bringing a civil suit in these circumstances, it has been recognized that without the exclusionary rule, school authorities "would be free to trench upon constitutional rights of the students in their charge without meaningful restraint or fear of adverse consequences." *Jones v. Latexo Ind. School Dist.*, *supra*, at 239; *Smyth v. Lubbers*, *supra* at 794.

2. Administrative Sanctions Against The Offending School Employee Could Not Be Sufficiently Enforced To Serve As An Effective Deterrent To Constitutional Violations

The use of sanctions against the individual who conducted the illegal search has also been proved to be an unsuccessful deterrent in the law enforcement context. The record of American search and seizure litigation strongly suggests that most breaches of the Fourth Amendment occurred if not at the explicit command, at least with the tacit approval, of the supervisors of the individuals carrying out the search. Edwards, *Criminal Liability for Unreasonable Search and Seizure*, 41 Va.L.Rev. 621, 628 (1955) (hereinafter *Edwards*) Under these

²⁴ Even with regard to such an extreme invasion of personal privacy as a strip search, the good faith immunity has been successfully asserted by a teacher in defense to a 42 U.S.C. 1983 action. In *Bellnier v. Lund*, *supra*, the District Court ruled that the law in the area of school searches was sufficiently unsettled that the defendant was immune from damages from her unlawful strip search of an entire class of fifth graders. Compare *Doe v. Renfrew*, *supra*, 631 F.2d at 91; *M. M. v. Anker*, *supra*, 477 F.Supp. at 837.

circumstances, those in authority would be more likely to protect an overzealous subordinate than to recommend criminal or administrative sanctions. *Id.*; *Franks v. Delaware*, 438 U.S. 168, 169 (1978); *Wolf v. Colorado*, *supra* at 42. Reported decisions reflecting that such penalties have been imposed are almost non-existent. *Edwards* at 629.

Such results could be expected in the educational context as well. If internal disciplinary procedures are never utilized, they can hardly serve any deterrent function. Moreover, as one commentator has suggested with regard to the police, if the alternative of personal sanctions could somehow be made to work effectively, the end result would likely be too much deterrence:

Critics of the exclusionary rule who would replace it with sanctions aimed directly at the offending officer often miss the point that if such sanctions were viable, they would deal a more crippling blow to law enforcement than does the mere exclusion of illegally-seized evidence. . . . Under threat of sanctions imposed directly on the individual officer, . . . officers may forbear from acting, even when they think they have the right, for fear that those who review their actions will disagree. This additional deterrence at the margin is an unnecessary social cost.

Mertens and Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 408-09 (1981).

See also *Edwards* at 695; *Dellinger* at 1555.

In view of the small likelihood that personal sanctions would be imposed, and the problems that could be engendered even if such an approach could be effectively implemented, this proposed alternative is an inadequate substitute for the exclusionary rule.

E. In Addition To Deterring Violations Of The Fourth Amendment The Exclusionary Rule Is Constitutionally Required To Protect Judicial Integrity

Petitioner's argument that the exclusionary rule should not be applied to illegally conducted school searches is based upon

the contention that the sole purpose of this remedy is deterrence of future misconduct. Such was not, however, the historic basis upon which this rule was founded. In *Weeks v. United States*, *supra*, when this Court ruled that evidence seized in violation of the Fourth Amendment would be inadmissible in federal trials, the deterrence rationale was not mentioned.²⁵ Instead the unanimous Court held that:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. *Id.* at 392.

See also *Olmstead v. United States*, 277 U.S. 438 (1928).

This justification, which has been labeled the "judicial integrity" [*Elkins v. United States*, *supra* at 222] rationale, was described thusly in *Terry v. Ohio*, 392 U.S. 1, 13:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur . . . When [unconstitutional] conduct is identified, it must

²⁵ Petitioner erroneously asserts that the exclusionary sanctions imposed in *Weeks*, *supra*, were intended for deterrent purposes. (See Petitioner's Brief at 9). Deterrence was not mentioned as a basis for the exclusionary rule until *Wolf v. Colorado*, *supra*.

be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

Thus it is not merely the illegal seizure of evidence which the Fourth Amendment condemns, but its use as part of an evidentiary transaction commencing with the search and continuing through the prosecutor to the Court itself.

Since deterrence was first mentioned in *Wolf v. Colorado*, *supra*, as a supporting basis of the exclusionary rule, its theoretical importance has, admittedly, increased. See *e.g. United States v. Calandra*, *supra*; *United States v. Janis*, 428 U.S. 433, 458-59, n. 35 (1976). Nevertheless, it cannot be said that this Court has abandoned the imperative of judicial integrity. In *United States v. Johnson*, *supra*, this Court rejected the contention that deterrence forms the sole criteria for the applicability of the exclusionary rule. Retroactive effect was given to the decision in *Payton v. New York*, 445 U.S. 573 (1980) requiring police officers to obtain a warrant in order to arrest a suspect in his home, a point upon which the law had previously been unsettled. The decision to apply the *Payton* rule retroactively could hardly have been compelled by the need to deter future police misconduct. Reliance was instead placed upon the judicial integrity rationale as formulated by Justice Harlan in his dissent to *Desist v. United States*, 394 U.S. 244 (1969):

We do not release a criminal from jail because we like to do so or because we think it is wise to do so, but only because the Government has offended constitutional principle in the conduct of this case. *United States v. Johnson*, *supra*, 102 S.Ct. at 2594, quoting *Desist v. United States*, *supra* at 258.

Similarly, during the course of this Court's opinion in *United States v. Payner*, 447 U.S. 727 (1980), Justice Powell reaffirmed that the exclusionary rule serves the twofold purpose of deterring illegality and protecting judicial integrity. *Id.* at 734, n.8.

Despite the growing emphasis upon deterrence, this Court has not relinquished the older imperative of judicial integrity.

Indeed as previously set forth in Point IIB, *supra*, the concern with the deterrent effect of the exclusionary rule has predominated only in proceedings ancillary or collateral to a criminal trial. Thus far, this Court has not allowed illegally seized evidence to be introduced on the prosecution's case-in-chief against the victim of the search. Such is the position the petitioner presently urges upon this Court. To do so would strike at the heart of the principle of judicial integrity, and render the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *See Elkins v. United States*, *supra* at 222-23.

F. The Exclusionary Rule Serves A Constitutionally Prescribed Educational Function Most Appropriately Served In The Public School Context

The exclusionary rule has been recognized, in the context of the police, to serve an educative function:

More importantly, over the long term, this demonstration [the suppression of evidence secured by illegal searches] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law-enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system. *Stone v. Powell*, 428 U.S. 465, 493 (1976).

As was long ago observed by Justice Brandeis, "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the Government becomes a lawbreaker, it breeds contempt for the law . . ." *Olmstead v. United States*, *supra* at 484-85 (1928) (dissent).

Surely the educative purpose of the exclusionary rule is more appropriately served in the school setting than in any other aspect of society. *Jones v. Latexo Ind. School Dist.*, *supra* at 239. "Students look to teachers, school administrators and others in positions of authority as models for their own behavior and development into responsible adults." *Id.* It

would be ironic in the extreme if in our schools, the institution upon which we rely to teach our children the rights and responsibilities of our constitutional form of government, violations of those rights are countenanced rather than met with the most stringent remedies available. "[H]ow can teachers serve as models for behavior if they disobey the law?" Koff, *Coping with Disruptive Students*, 63 Nat'l Assoc. of Sec. Sch. Principals Bull. 8, 14 (Feb. 1979).

The special educational significance of the Fourth Amendment in the school setting was eloquently expressed by Justice Brennan in his dissent from the denial of *certiorari* in *Doe v. Renfrew*, *supra*, 451 U.S. at 1022, a case in which the entire student body of a secondary school was subjected to searches by specially trained dogs:

We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant *certiorari* to teach petitioner another lesson: that the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that before police and local officers are permitted to conduct dog-assisted dragnet inspections of public school students, they must obtain a warrant based on sufficient particularized evidence to establish probable cause to believe a crime has been or is being committed. Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedom.

If, as a result of the decision in the instant matter, students are accorded Fourth Amendment rights, but are denied any adequate means of protecting those rights, this Court will have effectively taught them "to discount important principles of our government as mere platitudes." See *West Virginia State Bd. of Education v. Barnette*, *supra* at 637

CONCLUSION

For the foregoing reasons, respondent respectfully requests that certiorari be dismissed, or in the alternative, that the decision of the Supreme Court of New Jersey be affirmed.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
Public Defender of New Jersey
Attorney for Respondent

/s/ By: **Lois De Julio**
LOIS DE JULIO
First Assistant
Deputy Public Defender
20 Evergreen Place
East Orange, New Jersey 07018

ANDREW DILLMANN
Assistant Deputy Public Defender

TINA BOYER
Legal Assistant

MAR 21 1984

ANDREW L. STEVAS.
CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

-VS-

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONER

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
(609) 984-4804

Attorney for Petitioner

Allan J. Nodes
Attorney of Record

Of Counsel & On the Brief
ALLAN J. NODES
VICTORIA CURTIS BRAMSON
Deputy Attorneys General
Division of Criminal Justice

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No. 83-712

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OCTOBER TERM, 1983

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Petitioner,

-vs-

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONER

The question presented by this petition, the opinions below, jurisdictional statement, listing of applicable constitutional and statutory authorities and statement of the case are all enumerated in petitioner's brief filed with this Court on January 14, 1984, and are, therefore, not repeated herein.

LEGAL ARGUMENT

POINT I

THIS COURT HAS JURISDICTION TO DECIDE THE ISSUE PRESENTED IN PETITIONER'S BRIEF.

In Point One of her response to petitioner's brief, respondent asserts that independent and adequate state grounds exist for the state court decision and, therefore, that this Court should dismiss the writ of *certiorari* as improvidently granted. On the issue of the application of the exclusionary rule to school searches, the opinion of the New Jersey Supreme Court relies solely on federal law. *State in the Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983). Hence, this Court properly has jurisdiction to resolve the issue concerning application of the exclusionary rule. *Michigan v. Long*, ____ U.S. ____, 103 S. Ct. 3469 (1983).

The New Jersey Supreme Court framed the issue as "whether the Fourth Amendment exclusionary rule applies to student searches made by public school administrators," *id.* at 336, 463 A.2d at 936, and concluded that "the issue is settled by the decisions of the [United States] Supreme Court." *Id.* at 341, 463 A.2d at 939. The state court, therefore, relied upon federal law and the decisions of this Court in "accept[ing] the proposition that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." *Id.* at 341-342, 463 A.2d at 939.

Following this Court's granting of the State's petition for *certiorari* on November 28, 1983, respondent returned to the New Jersey Supreme Court to allege that the state court opinion in this matter was based upon unenunciated independent state grounds. Despite respondent's urging the New Jersey Supreme Court to issue a supplemental opinion clarifying this purported "ambiguity," the state court denied the motion for clarification.

As this Court held in *Michigan v. Long*, ____ U.S. at ____, 103 S. Ct. at 3476, jurisdiction will be exercised when a state court decision "appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." The New Jersey Supreme Court's holding in *State in the Interest of T.L.O.* is based on that court's interpretation of the

applicability of the Fourth Amendment to searches by school officials. The opinion framed the issue solely in terms of the Fourth Amendment and, in reaching the conclusion that the Fourth Amendment exclusionary rule did apply to school searches, the state court relied solely upon interpretations of the federal Constitution. Indeed, the only state cases to which reference is even made in this portion of the opinion deal exclusively with questions pertaining to the Fourth Amendment of the United States Constitution without mention of the state Constitution.¹ See *State in the Interest of T.L.O.*, 94 N.J. at 341, 463 A.2d at 938-939. Thus, respondent's assertion that the opinion is actually founded upon independent state grounds is refuted by the opinion itself.

Even were the opinion ambiguously worded in this regard, as respondent alleged in her unsuccessful motion to the state court for "clarification" of the opinion below, that fact would not divest this Court of jurisdiction. For, "it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940); accord, *Michigan v. Long*, ____ U.S. at ____, 103 S.Ct. at 3476.

Nor can it be contended that the New Jersey Supreme Court was unaware of the requisites of *Michigan v. Long*. In *State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983), issued the same day as the opinion under review, the state court was careful to specifically note that "[c]onsonant with the United States Supreme Court's directive in *Michigan v. Long* ... we expressly observe that our decision rests, in part, upon state constitutional grounds independent of federal law." *Id.* at 217 n.3, 463 A.2d at 324 n.3 (citation omitted, emphasis supplied). Thus, had the state court intended to rely upon state constitutional grounds in reaching its decision in *T.L.O.*, it obviously would have expressly done so. Moreover, long before *Michigan v. Long* was decided, the New Jersey Supreme Court did not hesitate to expressly rely upon independent state grounds to reach the results it desired. See, e.g., *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982); *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975); *Robinson v. Cahill*, 62 N.J. 473,

1 *In re Martin*, 90 N.J. 295, 312, 447 A.2d 1290 (1982); *State in the Interest of G.C.*, 121 N.J. Super. 108, 114, 296 A.2d 102 (J.D.R.C. 1972). In fact, the portion of *In re Martin* cited by the state supreme court quoted directly from opinions of this Court.

303 A.2d 273 (1973), cert. den. 414 U.S. 976 (1973). It is thus abundantly clear that, if the New Jersey Supreme Court had intended to rely on state grounds as the basis for its opinion in this case, it would have done so expressly.²

The issue before this Court is simply whether the Fourth Amendment exclusionary rule requires the suppression in a court proceeding of evidence of criminality uncovered by school officials acting in furtherance of their official duties. The state court opined that the decisions of this Court require suppression whenever an unreasonable official search occurs. As detailed in petitioner's brief previously filed with this Court, whether to exclude evidence must be determined by balancing the societal costs against any deterrent benefits of exclusion. In the case of a school search, the costs of application of the exclusionary rule far outweigh any possible derivative benefits; thus, the state court erred in failing to recognize that exclusion is not uniformly mandated by the Fourth Amendment.

Respondent details each state law citation referenced in the state opinion. Yet none of these state law references formed the basis for the New Jersey Supreme Court's holding on application of the exclusionary rule, and thus the references have no bearing whatsoever on the issue before the Court. The issue of what standard of reasonableness exists to govern searches undertaken by school officials in the pursuit of their duties is not before the Court.³ Hence, it is irrelevant that the state court opinion notes that seven state statutes

2 Furthermore, it was assumed by all parties to the proceedings in the state court, including those participating as *amici curiae*, that the state Constitution afforded no greater remedy than the federal Constitution under the circumstances of this case.

3 While recognizing that the standard of reasonableness governing a school search is not here at issue (respondent's brief at 31 n.18), respondent nevertheless notes that petitioner makes "no attempt to demonstrate that the search was legal." (Respondent's brief at 16). Although petitioner does not concede the illegality of the search undertaken below, it is fruitless to suggest that this Court alter the state court's error in applying the facts to the correct legal standard. Respondent also asserts that use of less than the probable cause-warrant requirement violates the Constitution. This is incorrect.

This Court has previously articulated a flexible standard for assessing the reasonableness of a search, balancing the need to search against the invasion which the search entails. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967). The majority of courts have applied the rationale of *Wolfish* and *Camara* to the school search situation and rejected the criminal case standard of probable cause. Such courts have determined, as did the state court in the present matter, that the balance requires application

exist to charge school officials with the duty to maintain order, safety and discipline in the schools. See *State in the Interest of T.L.O.*, 94 N.J. at 342-343, 463 A.2d at 940. It is similarly irrelevant that the need to insure order and thereby provide a "thorough and efficient education" and the individual's need for privacy are balanced by the state court in order to arrive at the standard to govern the reasonableness of school searches. 94 N.J. at 344, 346, 349, 464 A.2d at 940, 942, 943. Furthermore, it has no bearing on the single

(Footnote 3 Continued)

of a "reasonable grounds" standard. See *State in the Interest of T.L.O.*, 94 N.J. at 345 n.7, 346, 463 A.2d at 941 n.7, 941-942.

This standard makes far more sense as applied to the school search situation than does the probable cause standard espoused by respondent. See *In re G.*, 11 Cal.App.3d 1193, 1196-1197, 90 Cal.Rptr. 361, 362-363 (Ct. App. 1970). Indeed, the probable cause standard cannot effectively regulate decisions to search which result from attempts to enforce school regulations. A teacher suspecting, perhaps on the basis of anonymous information, that a student possesses a copy of an examination which has not yet been given, could not reasonably be required to meet a standard of probable cause before undertaking measures to correct the situation. Decisions to search made on the basis of suspected violations of school regulations cannot be separated, with a lower standard of reasonableness applied, from decisions based on suspected criminal violations, such as possession of a weapon on school grounds.

The school's interests in carrying out searches include the duty to provide a safe educational atmosphere free from disruption, and the absence of less intrusive alternatives to an immediate search. See *In re L.L.*, 90 Wis.2d 585, 600-601, 280 N.W.2d 343, 350-351 (1979). The student has a lessened expectation of privacy while in school because of the expected restraint exercised over students for security or discipline and the constant interaction among students, faculty and administrators. *Id.*; see also *Doe v. Renfrow*, 475 F.Supp. 1012, 1022 (W.D. Ind. 1979). In this regard, it is pertinent to note that N.J. Stat. Ann. 18A:37-1 (West 1968) provides that pupils in the public schools must comply with the school rules and submit to the authority of the school officials. This legal duty of students to submit to authority and obey rules contains an implied consent to a diminished expectation of privacy while in the school. Cf. *United States v. Biswell*, 406 U.S. 311 (1972), and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise). Indeed, the very authority which justifies the state in compelling students to attend school empowers it to subject students to the level of supervision and control necessary to ensure that the goals of the educational system will be fulfilled and that students' health and safety will not be jeopardized during their attendance. See *Ingraham v. Wright*, 430 U.S. 651 (1976). The same reasoning used in *Ingraham* to justify the use of corporal punishment of students would obviously apply to the less severe intrusion of a search.

issue before this Court that *N.J. Stat. Ann. 2A:4-60 (West 1952)* exists and provides that juveniles have the same rights and defenses available as do adults. We do not distinguish, for purposes of this case, between adult and juvenile students attending public schools.⁴

Prior to this Court's decision in *Michigan v. Long*, *supra*, when the Court was unsure about whether an opinion was based upon federal or state constitutional grounds, it would remand the matter to the state court and request a clarification. *See, e.g., Louisiana v. Mora*, 423 U.S. 809 (1976). More recently, the Court has refused to remand and, instead, has examined state law to determine whether state courts have used federal law to guide their application of state law or to provide the actual basis for the decision reached. *Michigan v. Long*, ____ U.S. at ____, 103 S.Ct. at 3475. *See Texas v. Brown*, ____ U.S. ____, ____, 103 S.Ct. 1535, 1538 (1983). Indeed, even where the federal and state grounds for decision may be intermixed, this Court has felt required to reach the merits. *See Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). In *Michigan v. Long*, *supra*, the Court, however, observed that this *ad hoc* method of dealing with cases was unworkable "to achieve the consistency that is necessary." *Id.* at ____, 103 S.Ct. at 3475. This Court therefore determined to exercise jurisdiction unless a plain statement of an independent state ground appears on the face of the state court opinion.

In the instant case, the state court did not indicate by a "plain statement" that its decision was based upon state law, even though it was well aware of the requirements of *Michigan v. Long*. *See State v. Bruzzese*, 94 N.J. at 217 n.3, 463 A.2d at 324 n.3. Indeed, in its opinion in *T.L.O.*, the state court set forth federal law and the decisions of this Court as the basis for its holding that the exclusionary rule applies to evidence obtained in a search conducted by school officials. Furthermore, when confronted, by respondent's motion to clarify the state court opinion, with its "omission" of state grounds, the New Jersey Supreme Court declined to interject such an alternative basis for its decision. Hence, it is clear that this matter involves

4 Indeed, one of the two students considered in the state court opinion, Jeffrey Engerud, was 18 years of age at the time of the search. The significant factor justifying the state court's decision establishing the standard of reasonableness for school searches was the setting of the search, not the chronological age of the student. Once the state court determined that the searches were unreasonable, it deemed application of the exclusionary rule to be mandatory without reference to the student's age.

"on its face" an interpretation of federal law. This failure to conform to the dictates of *Michigan v. Long* vests this Court with jurisdiction. Since the state court did not indicate that its opinion rested on independent state grounds, this Court has properly exercised its jurisdiction in this matter.

POINT II

APPLICATION OF THE EXCLUSIONARY RULE WILL NOT SERVE TO DETER ANY IMPROPER SEARCHES BY SCHOOL OFFICIALS.

Respondent's brief repeatedly implies that the position taken by petitioner condones searches which are violative of the United States Constitution. This is obviously not the case. We agree that unconstitutional searches should not occur; the issue between the parties is simply whether suppression of probative evidence of criminality in a subsequent court proceeding can have any measurable deterrent effect upon the decision of educators to search their charges. We submit that the exclusionary rule is inappropriate precisely because, at least in the school search situation, it cannot achieve the deterrent ends which justified its creation.⁵

Respondent asserts that exclusion of evidence is constitutionally mandated when the state would use illegally seized evidence on its case-in-chief. This argument requires an identity between a violation of the Fourth Amendment and the decision to suppress, a position which has been rejected by the decisions of this Court.⁶ This

5 In fact, as respondent fails to recognize, there are two competing values. The suppression of evidence of criminality also must teach these same young persons the lesson that wrongdoers are not appropriately punished. While, of course, unconstitutional searches are unjust, justice is not served when, in Cardozo's famous words, "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). This latter value has been deemed subordinate to that of preventing unconstitutional searches; where, however, the deterrent value of the rule is not served, the injustice of permitting the criminal to go free is paramount.

6 Respondent posits a relationship between a lowered standard of reasonableness governing a search and invocation of the exclusionary rule, arguing that "the difference in the nature of the search has already been balanced and accommodated by the use of a standard less than probable cause." (Respondent's brief at 33). Application of the exclusionary rule in fact consists of two independent evaluations: (1) whether the search itself was "unreasonable" and (2) whether application of the rule is of any deterrent utility. These two evaluations are wholly unrelated. It is, of course, clear that, inversely, this Court has never even implied that the existence of the exclusionary rule would justify lowering standards to the extent that constitutional violations are permitted. Thus, respondent's argument regarding a balance between invocation of the exclusionary rule and lowered constitutional standards is fallacious.

Court has recognized that exclusion is not commanded in every case of illegality; rather, the Court must weigh the illegality against "the considerable harm that would flow from indiscriminate application of an exclusionary rule." *United States v. Payner*, 447 U.S. 727, 734 (1980). Indeed, it is established that "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." *Id.*

If deterrence of unlawful searches will not be achieved by application of the rule, then to suppress evidence will only serve to benefit those students guilty of criminal acts, while according no protection to innocent students who are victims of illegal but fruitless searches. See *Irvine v. California*, 347 U.S. 128, 136 (1954). This anomalous result can be corrected only by utilization of effective methods of deterrence. In the school search situation not only is the exclusionary rule unworkable to achieve compliance with the Constitution, but there are other, non-judicial factors inherent in the system which can themselves generate deterrence of improper searches. As this Court recognized in *Ingraham v. Wright*, 430 U.S. 651, 670 (1977), the "openness of the public school and its supervision by the community afford significant safeguards" against official abuse. Most citizens are products of the public schools; many have children attending these schools. Hence, while unlawful police acts directed at those accused of crime may fail to evoke outrage in honest citizens who cannot identify with such a victim, the community-at-large has a substantial interest in halting any abuses by school officials. Some parent-teacher cooperation is a recognized fact in public school regulation, with parents having impact on the policies and behavior of school officials. Thus, school officials, being directly responsible and answerable to parents, cannot and will not be overly protective of "an overzealous subordinate." (Respondent's brief at 47).

Where it can serve no deterrent purpose, there is no reason to apply the exclusionary rule. This Court has established that suppression is not a personal constitutional right of one aggrieved by an unlawful search. *United States v. Calandra*, 414 U.S. 338, 348 (1974). The exclusion of evidence is not intended to remedy the particular wrong done by an unconstitutional search. *Id.* Thus, no student who has been unlawfully searched is "entitled" to have evidence of his criminality suppressed. Only if, by sacrificing the justice of conviction, future official overstepping can be avoided, is the exclusionary rule justified. It is clear that "a rigid and unthinking application of

the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

As discussed in petitioner's brief previously filed with this Court, a school official's primary concern is education and he has no professional interest in the criminal justice process.⁷ Such an official may be faced with school exigencies, such as a risk of harm to the general student population, where "prompt action" is required and decisions must be "made in reliance on factual information supplied by others."⁸ *Wood v. Strickland*, 420 U.S. 308, 319 (1975). Regardless of whether any "evidence" may be inadmissible in a subsequent criminal trial, that official may properly be expected to perform his duty as he sees it, including undertaking a disciplinary search. In such circumstances, the deterrent goal of the exclusionary

7 This Court has only extended the suppression sanction to other than police agents when the government searchers were primarily engaged in a law enforcement function, albeit not necessarily enforcement of criminal laws. See *Michigan v. Clifford*, ___ U.S. ___, 104 S.Ct. 641 (1984) (arson investigators); *Michigan v. Tyler*, 436 U.S. 499 (1978) (fire and police officials jointly investigating cause of fire); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (inspection for safety hazards and violations of OSHA regulations); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (interdicting flow of illegal entrants into the United States recognized as "formidable law enforcement problem" for border patrol); See *v. City of Seattle*, 387 U.S. 541, 543 (1967) (official inspection "to aid enforcement of laws" prescribing minimum physical standards for commercial premises); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (municipal health inspector searching for possible violations of city's housing code; Court noted that "[l]ike most regulatory laws, fire, health and housing codes are enforced by criminal process"); *Jones v. United States*, 357 U.S. 493 (1958) (search by federal alcohol agents investigating information that defendant was operating an illicit distillery).

8 School officials confront an exceedingly difficult task in discharging their educational duties in today's school system. The risks of violence for young adolescents in cities are greater while attending school than elsewhere; nearly 7,000 schools in this country are seriously affected by crime. Wyne, "The National Safe School Study: Overview and Implications," 2 (1979), ERIC #ED-175-112. Indeed, there is a clear relationship between declining standardized test scores for public school children and the fact that schools are not now safe environments in which to learn. Clark, "Violence in the Public Schools: The Problem and Its Solutions," 4 (1978), ERIC #ED-151-990. School administrators must have broad supervisory and disciplinary powers in order to protect their students so that the educational function may be fulfilled.

rule cannot be achieved.⁹

Indeed, it is precisely this necessity for school officials to exercise their judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and students," which has led this Court to hold that such officials have a qualified immunity from civil liability. *Wood v. Strickland*, 420 U.S. at 320. If this Court, as indicated in *Wood v. Strickland*, has refrained from imposing liability on school officials in order that their honest judgment not be affected by considerations of personal liability, it is clear that a determination has been made that school officials are not to be dissuaded from such discretionary actions, including searches. Hence, even if application of the exclusionary rule could deter school officials from exercising similar honest judgment in a decision to search a student, it would be undesirable to so interfere with decision-making by those officials. Indeed, it would be anomalous to forego direct deterrence by providing personal immunity while at the same time attempt, by use of the exclusionary rule, to indirectly deter school officials from those same exercises of judgment inherent in carrying out their proper function.

The state court noted the propriety of the exercise of official judgment in this case when it stated:

We do not disparage the school officials' actions in these cases. They must often, as here, act on short notice based on the information they possess....

State in the Interest of T.L.O., 94 N.J. 331, 349, 463 A.2d 934, 943 (1983). That court, however, went on to view the exclusionary rule as mandated because the search was not, viewed retrospectively, proper. In this, the state court erred; it incorrectly deemed suppression to be a personal remedy for a student aggrieved by an unlawful search. This Court has declared otherwise and, hence, the state court judgment, suppressing evidence seized in a proper exercise of the school official's discretion, cannot stand.

9 Respondent and *amicus curiae* the American Civil Liberties Union both observe that several states have statutes requiring school officials to report school crimes to the police. (Respondent's brief at 20; ACLU brief at 32-33). The fact that teachers may be required by school regulation or even statute to report to police any crime occurring on school grounds, or evidence of a crime which is discovered, does not alter the analysis that the exclusionary rule cannot serve to deter searches by school officials. The function of school officials is not to investigate or prosecute crimes but, as is the proper obligation of any citizen, to report crimes if encountered. School officials do not undertake student searches in order to further prosecutions for criminal violations; that this may be the result is immaterial to a particular decision to search made in furtherance of school disciplinary objectives.

CONCLUSION

For the foregoing reasons, as well as the reasons expressed in petitioner's brief previously filed with this Court, the State of New Jersey urges this Court to rule that the exclusionary rule is inapplicable to school searches performed by school administrators and teachers and to reverse the decision of the New Jersey Supreme Court suppressing evidence.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF N.J.
ATTORNEY FOR PETITIONER

By: s/A.J.N.

Allan J. Nodes
Deputy Attorney General
Attorney of Record

ALLAN J. NODES
VICTORIA CURTIS BRAMSON
DEPUTY ATTORNEYS GENERAL

OF COUNSEL AND ON THE BRIEF

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

—vs.—

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

**BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION
AND THE AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY,
~~AMERICAN CIVIL LIBERTIES UNION~~
IN SUPPORT OF AFFIRMANCE**

Of Counsel:

CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10032
(212) 944-9800

DEBORAH H. KARPATKIN
American Civil Liberties
Union of New Jersey
38 Walnut Street
Newark, New Jersey 07102
(201) 642-2084

BARRY S. GOODMAN,
Counsel of Record
Crummy, Del Deo, Dolan
& Purcell
A Professional Corporation
Gateway I
Newark, New Jersey 07102
(201) 622-2235

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and protecting the liberties guaranteed in the Constitution. The American Civil Liberties Union of New Jersey is one of its state affiliates, which previously filed a brief amicus curiae in this case with the New Jersey Supreme Court.

The ACLU and its affiliates have devoted particular attention in recent years to the rights of groups who, because of their exclusion from the political process for various reasons, are in particular need of the anti-majoritarian protections of the Bill of Rights. Our experience working with students has convinced us that their Fourth Amendment rights are especially important, in order to

protect them from harms of unreasonable, arbitrary, or intrusive searches, and, as the New Jersey Supreme Court observed in the words of Justice Jackson, "to "educat[e] the young for citizenship...[and to ensure that our young are not taught] to discount important principles of our government as platitudes."

We therefore file this brief amici curiae, with the consent of the parties,¹ to demonstrate that the understandable and valid concerns for school safety and the preservation of an effective learning environment that petitioner and its amici raise do not come close to justifying the wholesale removal of effective Fourth Amendment rights at the schoolhouse gate.

1. Letters of consent are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. This Court has consistently held that juveniles, as well as adults, are "persons" whose rights are to be protected from governmental intrusion under the United States Constitution. A juvenile does not shed these constitutional rights, including the right to be free from unreasonable searches under the Fourth Amendment by governmental agents, such as school officials, at the schoolhouse gate.

2. Where a juvenile manifests an expectation of privacy in an item such as her pocket-book, the juvenile does not abandon her right to privacy upon entering school. Since for every search of a student that uncovers evidence of wrongdoing, a plethora of innocent impressionable juveniles will have had their expectation of privacy shattered and their

right to be secure from unreasonable searches violated, it is essential that juveniles' Fourth Amendment rights be protected in and out of school.

3. The exclusionary rule is no less vital where the search is conducted in school than where it is conducted in similar non-law enforcement administrative contexts. Applying the exclusionary rule would inhibit collusion between school officials and the police, deter arbitrary and unchecked searches of students by school officials, and provide a meaningful mechanism for discouraging unwarranted invasions of the right of juveniles to be secure from unreasonable searches and seizure.

4. The doctrine of in loco parentis, which was created as a benevolent means to protect juveniles, cannot be applied to deny juveniles essential constitutional rights.

In addition, since school officials more closely represent the interests of the State than the parents (or juveniles), they should be held to a probable cause standard before they are allowed to search the juveniles.

5. The decision by the New Jersey Supreme Court, although not requiring school officials to satisfy the probable cause requirement before searching a student, at least attempts to balance the need of school officials to conduct reasonable searches of students in school with the right of students to be free from unreasonable searches and seizures. The New Jersey Supreme Court's "reasonable grounds" standard at least would prevent arbitrary and capricious searches by school officials and provide some protection for students to be free from unreasonable searches and seizures.

ARGUMENT

I. JUVENILES DO NOT SHED THEIR FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AT THE SCHOOLHOUSE GATE.

Although it has not been and could not be seriously argued that juveniles, as well as adults, are not "persons" who are protected from unreasonable searches by governmental officials outside of the school setting, the Petitioner in this matter essentially is arguing that juveniles lose this constitutional protection upon entering school. However, this Court consistently has held that students do not shed their constitutional rights at the schoolhouse gate. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (Fourteenth Amendment due process clause applicable to student suspensions because a suspension constitutes a deprivation of the student's property rights); Tinker v. Des

Moines Indep. Community School Dist., 393 U.S. 503 (1969) (First Amendment rights are applicable to students because students are persons under the Constitution); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (since the Constitution protects all citizens, adults and children alike, students cannot be compelled to pledge allegiance to the flag).²

The Fourth Amendment protects "persons," including adults and juveniles who are in school or out of school, from unreasonable searches by governmental officials. See Washington v. Chrisman, 455 U.S. 1 (1982)

2. Underlying these decisions is the holding that the conduct of school officials, as "governmental agents," involves state action and the students therefore must be afforded the protections of the United States Constitution. See also Board of Educ. v. Pico, 457 U.S. 853 (1982); Ingraham v. Wright, 430 U.S. 651 (1977); Wood v. Strickland, 420 U.S. 308 (1975).

(university student protected by the Fourth Amendment where his property was searched by a school official who was employed as a security guard).³ As this Court emphatically declared in the landmark decision of Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 511:

Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect.

3. See also N.J. Stat. Ann. 2A:4A-40 (West Supp. 1983), in which the New Jersey Legislature specifically mandated that this protection be applied fully to juveniles. This Statute, which provides in pertinent part that "(a)ll defenses available to an adult charged with a crime, offense, or violation shall be available to a juvenile charged with committing an act of delinquency," superseded N.J. Stat. Ann. 2A:4-60, which contained identical language and was cited in State in Interest of T.L.O., 94 N.J. 331, 342n.5 (1983). Based upon this Statute and for the reasons advanced by the Respondent, it is respectfully submitted that this Court improvidently granted certiorari and is precluded from deciding in this case whether juveniles have less Fourth Amendment rights in the school setting than adults.

Under the Fourth Amendment, any warrantless search of a person or his/her property is prima facie invalid and gains validity only if it comes within one of the specific exceptions that have been created by this Court. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The only such exception to the Fourth Amendment that deals, as here, with a search by a non-police governmental official, involves administrative searches by officials who are not concerned with law enforcement per se, but rather are concerned with virtually the same type of administrative supervision and inspection as public school officials. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (inspectors from the Occupational Safety and Health Administration); Michigan v. Tyler, 436 U.S. 499 (1978) (firefighters); Camara v. Municipal

Court, 387 U.S. 523 (1967) (building inspectors); Jones v. United States, 357 U.S. 493 (1958) (federal alcohol agents).

As Justice White explained for the majority in Marshall v. Barlow's, Inc., 436 U.S. at 312-313,

the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. Ibid. The reason is found in the "basic purpose of this Amendment. . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara, supra, at 528, 18 L Ed 2d 930, 87 S Ct 1727. If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.

Since "(t)he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when

to search and whom to search," id. at 323, this Court required probable cause for the search either by a showing of specific evidence of an existing violation or a showing that reasonable legislative or administrative standards have been satisfied with regard to the particular property. Id. at 320.

As with the inspectors in Marshall v. Barlow's, Inc., as well as the other administrative search cases, public school officials are charged with the responsibility for maintaining the safety of property and people, in this case schools and the students who attend them. Indeed, at least in New Jersey, school officials are required by statute to maintain order in the schools, see N.J.Stat.Ann. 18A:25-2 (West Supp. 1983), in much the same way as the inspectors in

Marshall were required by the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651-678 (1983), to maintain safety and health in the workplace.

In addition, the repercussions that may be suffered by a juvenile are no less severe than those that may be suffered by an employer whose business is inspected under OSHA. Even putting aside the plethora of innocent impressionable students who would be traumatized by being searched,⁴ a student who is searched faces the loss of significant property and liberty rights, such as expulsion or suspension from school, decreased opportunities for acceptance into an institution of higher learning, and increased difficulty in obtaining many jobs. The

4. The potentially lifelong trauma that can result from such searches of juveniles is discussed at length in Point II, infra.

student also faces, as here, criminal sanctions as a result of such a search.⁵

5. As explained by the American Bar Association's Institute of Judicial Administration in ABA Standards Relating to Schools and Education 1 (1982):

The school is also an important part of the system of juvenile justice. The law in the United States compels children to attend school. A. Steinhilber and C. Sokolowski, State Laws on Compulsory Attendance (1966). In school the child is subjected to an extensive body of rules, the violation of which results in various forms of punishment (or "discipline"). Not infrequently a sanction entails exclusion from school--a sentencing to the life of the streets. From there, a child may pursue a course of conduct that will bring him or her within the jurisdiction of the juvenile court. There is a close correlation between children in trouble in school and children in trouble with the law.

The ABA therefore recommended that if "the sanction that might result from the suspected misconduct includes expulsion, long-term suspension, or transfer to a school used or designated as a school for problem students of any kind, the search should be subject to all of the requirements of a police search." Id. at p. 31, §8.7B. In addition, "(a)ny evidence obtained directly or indirectly as a result of a search in violation of these standards should be inadmissible (without the student's express consent) in any proceeding that might result in either criminal or disciplinary sanctions against the student." Id., §8.8.

There is simply no basis in the law or logic to deny a juvenile these Fourth Amendment safeguards while at the same time subjecting the juvenile to the loss of these property rights and criminal punishment. Thus, as in the administrative search cases, school officials should be required to have probable cause before searching a student.

II. JUVENILES DO NOT ABANDON
THEIR EXPECTATION OF PRIVACY
BY ATTENDING SCHOOL.

Where, as here, a juvenile (or an adult) manifests an expectation of privacy in an item such as her pocketbook, which society generally recognizes as a reasonable expectation, the juvenile's right to maintain this privacy should not be affected by being in or out of school. See Smith v. Maryland, 442 U.S. 735, 740-741 (1979); United States v. Knotts, _____ U.S. _____, _____, 103 S.Ct.

1081, 1084-1085 (1983). See also Doe v. Renfrow, 451 U.S. 1022 (1981) (Brennan, J., dissenting from the denial of a petition for a writ of certiorari). Cf. Arkansas v. Sanders, 442 U.S. 753 (1979). In the similar situation involving a non-police governmental official, a firefighter whose purpose was to search a building for evidence of arson, this Court in Michigan v. Tyler, 436 U.S. 499, 506 (1978), explained that

there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment.

Accord Michigan v. Clifford, ____ U.S. ____, 104 S. Ct. 641 (1984).

A student's reasonable expectation of privacy is no less diminished because the official who is conducting the search is wearing the "uniform" of an educator and is investigating a suspected problem in the school. This expectation of privacy, especially in a repository for personal items, such as the student's own pocketbook in the present case, is not left outside when the student enters school.⁶

~~The right of juveniles in and out of~~
school to such an expectation of privacy from governmental intrusion must remain paramount when dealing with impressionable youths who are formulating a sense of their own being,

6. Curiously, it is unclear what, if anything, the school official who searched T.L.O. suspected was in her pocketbook. Even if he suspected that she had cigarettes, possession of cigarettes on school grounds was not a violation of school rules. In fact, the school had designated areas for the students to smoke cigarettes.

as well as respect for societal values. For every search of a student that uncovers evidence of wrongdoing, countless innocent students will have had their expectation of privacy shattered and their right to be secure from such searches violated. As William Buss succinctly wrote in "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 792 (1974):

There is a very good chance that an erosion of privacy and the destruction of human values that go with privacy is a greater long-range danger than the behavior that would be detected and deterred by student searches. It would be highly desirable if the citizens of the United States who are now in school learn to value privacy, learn by the school's example that the society respects it, and learn that the courts will protect it from invasion by governmental searches that violate fourth amendment principles.

Thus, the constitutional right of juveniles to be free from unreasonable searches and seizures when they enter school should be

jealously protected by this Court. Juveniles' rights cannot be violated due to the fear of the use of drugs either outside or inside school or simply as an expediency to maintain school discipline.⁷ Constitutional rights cannot be shed so easily. Indeed, there can be no question that the Constitution "protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

III. THE NECESSITY FOR THE EXCLUSIONARY RULE IS NO LESS VITAL IN THE EDUCATIONAL SYSTEM THAN IN SIMILAR NON-LAW ENFORCEMENT CONTEXTS.

The State appropriately acknowledges

7. As Justice Brennan aptly pointed out in Florida v. Royer, _____ U.S. _____, 103 S.Ct. 1319, 1332 (1983)(concurring opinion), "(a)lthough I recognize that the traffic in illicit drugs is a matter of pressing national concern, that cannot excuse this Court from exercising its unflagging duty to strike down official activity that exceeds the confines of the Constitution."

that public school officials are governmental agents and that the Fourth Amendment applies to the search of students but argues that the exclusionary rule should not be applied to the school setting. The exclusionary rule is no less vital for the enforcement of the Fourth Amendment rights of juveniles in school (and out of school) than for adults who are searched by similar non-law enforcement officials to whom this Court has applied the exclusionary rule. See, e.g., Michigan v. Clifford, ____ U.S. ____, 104 S.Ct. 641 (1984)(fire department investigators); Michigan v. Tyler, 436 U.S. 499 (1978)(firefighting officials); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (inspectors for the Occupa-

tional Safety and Health Administration).⁸
See also Donovan v. Dewey, 452 U.S. 594, 604
(1981)(the requirements of the Fourth Amend-
ment are satisfied regarding the search of a
mine where "rather than leaving the frequency
and purpose of inspections to the unchecked
discretion of Government officers, the Act
[the Mine Safety and Health Act, 30 U.S.C.
§801-962 (West Supp. 1983)] establishes a
predictable and guided federal regulatory
presence."). As Justice White explained for
the majority in Camara v. Municipal Court, 387
U.S. 523, 528 (1967), "(t)he basic purpose of
this Amendment, as recognized in countless

8. The exclusionary rule also recently has
been applied where, as in the case of a
student who is called into the office of a
school administrator, a suspect who was
detained did not believe he was free to leave
the room in which the search was conducted.
Florida v. Royer, _____ U.S. _____, 103 S.Ct.
1319 (1983).

decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials," not only the police.

In addition, the exclusionary rule has no less a deterrent effect regarding such arbitrary invasions in the school setting than it does in other administrative settings. For example, since evidence seized during searches by school and other administrative officials often is turned over to the police for use in criminal proceedings, applying the exclusionary rule also would unquestionably inhibit collusion between school officials and the police.⁹

9. As explained in Camara v. Municipal Court, 387 U.S. 523, 530-531 (1967), where regulations for maintaining order are enforceable by criminal sanctions, the Fourth Amendment's protections are critical:

(Footnote 9 continued on next page)...

In this regard, this situation is virtually indistinguishable from the "silver platter doctrine," which this Court emphatically rejected in Elkins v. United States, 364 U.S. 206 (1960) (evidence obtained by State

...(Footnote 9 continued from preceding page)

It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.... Like most regulatory laws, fire, health and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint.

If the Fourth Amendment is to be anything other than a hollow unenforceable right for juveniles, the exclusionary rule also must be applied to safeguard juveniles who otherwise would wrongfully be subjected to criminal sanctions as a result of searches by school officials. This is especially true in States that require school officials to report evidence of criminal activity to the police. See, e.g., Ala. Code §16-1-24 (Supp. 1983); Cal. Educ. Code §48902 (West Supp. 1983); Conn. Gen. Stat. Ann. § 10-233g (West Supp. 1983); Ill. Ann. Stat. ch. 122 §10-21.7 (Smith-Hurd Supp. 1982); Tenn. Code Ann. §§ 49-6-4209, 4301 (1983).

officials during an illegal search cannot be used by federal officials). As this Court held in Elkins, although cooperation between various governmental entities is to be encouraged, where one of those entities is not entitled to conduct a search in order to obtain evidence, it can neither directly or indirectly encourage another entity to obtain such evidence nor accept such evidence from the other governmental entity:

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will

be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

Id. at 221-222.¹⁰

10. Not only would the exclusionary rule deter any such collusion between school officials and the police, but judicial integrity also would be enhanced because the courts would not be placed in the position of admitting evidence in a criminal proceeding that, if seized by the police rather than the school official, would have been inadmissible. See Stone v. Powell, 428 U.S. 465, 485-486 (1976); Lee v. Florida, 392 U.S. 378, 385-386 (1968). Indeed, research has revealed no case decided by this Court in which evidence that was improperly seized by a non-police governmental official was permitted to be used in a criminal proceeding by the prosecution.

Similarly, school officials must be deterred from arbitrarily searching students and then turning over any evidence of wrongdoing that they are lucky enough to find to the police on a "silver platter." Students' constitutional rights cannot be forfeited simply because of the whim of or a rash act by a school official, especially where the school official is under a duty imposed by a statute,¹¹ board of education directive, or otherwise, to turn evidence over to the police. Since it is clear that no other mechanism for enforcing Fourth Amendment rights in the school context is available,¹²

11. See Statutes cited in footnote 9, supra.

12. Damage awards generally have been barred by the good faith defense as the New Jersey Supreme Court observed, State in Interest of T.L.O., 94 N.J. 331, 349 (1983), and, in any event, are hardly preferable to suppression from the school officials' point of view. In addition, injunctive actions effectively have been barred by City of Los Angeles v. Lyons, ____ U.S. ____, 103 S.Ct. 1660 (1983).

only by applying the exclusionary rule to such non-police administrative searches can these juveniles be protected from such unwarranted invasions of their basic Fourth Amendment right to be free from unreasonable searches and seizures.

IV. THE BENEVOLENT CONCEPT OF IN LOCO PARENTIS CANNOT BE APPLIED TO DENY JUVENILES THE ESSENTIAL PROTECTIONS OF THE FOURTH AMENDMENT.

A few early lower court decisions improperly excluded students from the protection of the Fourth Amendment based upon the erroneous assumption that the doctrine of in loco parentis justified this exclusion. However, "(w)hile the doctrine of in loco parentis places the school teacher or employee in the role of a parent for some purposes, that doctrine cannot transcend constitutional rights." Jones v. Latexo Indep. School

Dist., 499 F. Supp. 223, 229 (E.D. Tex. 1980). Accord Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).

As this Court noted in In re Gault, 387 U.S. 1, 16 (1967) (due process rights cannot be denied on the basis of in loco parentis), in the past, in loco parentis and the phrase parens patriae "proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."¹³

13. In In re Gault, this Court held that because a juvenile delinquency proceeding may lead to incarceration of the juvenile (as a search and seizure may lead to the juvenile proceeding), a juvenile has the constitutional right to due process of law and the privilege against self-incrimination. With regard to a juvenile's Fifth Amendment rights, this Court explained: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals,

(Footnote 13 continued on next page)...

In Kent v. United States, 383 U.S. 541 (1966), this Court held that juveniles could not be denied their constitutional rights in our juvenile courts under the concept of parens patriae, regardless of how benevolent the purpose may be. The role of these juvenile courts is virtually identical to

...(Footnote 13 continued from preceding page)

but not to children." 387 U.S. at 47. It would be similarly surprising if a child in or out of school could refuse to incriminate herself verbally but could not refuse to reveal physically incriminating evidence where probable cause to search does not exist.

This Court has recognized that juveniles also are entitled to other constitutional rights. See, e.g., In re Winship, 397 U.S. 358 (1970) (a juvenile cannot be convicted in a criminal prosecution, except upon proof beyond a reasonable doubt); Kent v. United States, 383 U.S. 541 (1966) (hearing for a juvenile must meet the essentials of due process and fair treatment); Gallegos v. Colorado, 370 U.S. 49 (1962) (confession taken from a juvenile violated his due process rights); Haley v. Ohio, 332 U.S. 596 (1948) (confession obtained from juvenile violated the juvenile's Fourteenth Amendment rights).

the role of our educational system insofar as both are responsible for molding the attitudes of and protecting our children. In addition, as in our schools today, although the juvenile courts then did not have the resources to cope with all the demands that were placed upon them, it was explained that the rights of the juveniles could not be compromised:

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts. . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id. at 555-556 (footnotes omitted).

In addition, the application of the in loco parentis doctrine to our present educational system ignores reality for two reasons. First, under this doctrine, public school officials do not acquire the same rights as parents have vis-a-vis their children. Second, public school officials act in concert with police officials by reporting findings of suspected criminal wrongdoing by juveniles in school and, as such, represent the interests of the police and State more than the parents or juveniles.

First, there can be no dispute that school officials do not have the same rights as parents with regard to juveniles. Under the concept of in loco parentis, a parent "may. . . delegate part of his parental authority during his life to the tutor or schoolmaster of his child; who is then in loco parentis and has such a portion of the

power of the parent committed to his charge."

1 W. Blackstone, Commentaries 453 (emphasis added).¹⁴ It cannot seriously be argued that parents have chosen to delegate to school officials all of their parental powers. In any event, the parents who would delegate the power to search their child and turn over the evidence to the police would certainly be the exception, not the rule.

It also is well settled that where a juvenile's constitutional rights are involved, a school official, as a governmental officer, does not have the same right to discipline the juvenile or otherwise impinge upon the juvenile's rights as the juvenile's parents. Thus, for example, parents may discipline their child for a peaceful, nondisruptive expression of the child's political beliefs,

14. Quoted in In re G.C., 121 N.J. Super. 108, 116, 296 A.2d 102, 106 (J. & D.R. Ct. 1972).

and may dictate whether or not the child prays or salutes the flag, whereas a public school official cannot. See, e.g., Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Similarly, in New Jersey, although parents may physically punish their child, a public school official is prohibited from inflicting corporal punishment on a student. See N.J. Stat. Ann. 18A:6-1 (West 1968).

Second, there can be no question that as in the present case public school officials routinely turn over to law enforcement authorities not only evidence of suspected wrongdoing by students, but also the students who are suspected of having committed the wrongful act. Indeed, several States require school officials to report evidence of

criminal activity to the police.¹⁵ Parents, however, do not have any such responsibility to and generally do not report wrongdoing by their children, even where the parents discover marijuana in their child's possession. Thus, although a cooperative effort by school officials and the police may be perceived as necessary to maintain discipline in the schools, it nevertheless firmly negates the fiction of in loco parentis and solidifies the role of public school officials as arms of the State.¹⁶

15. See Statutes cited in footnote 9, supra.

16. The fallacy of applying in loco parentis to the search of a juvenile by a public school official has been summarized in Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 768 (1974), as follows:

Insofar as in loco parentis sums up the peculiar school-student relationship and the school's related interest in searching students, it focuses almost entirely on protection of the other students and on coercive power over

(Footnote 16 continued on next page)...

Accordingly, in the context of searches and seizures, there is no reason to treat public school officials any different than other non-police governmental officials who have been entrusted with the safety and well-being of our society. School officials

...(Footnote 16 continued from preceding page)

the searched student. One of the things that makes in loco parentis such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate, and permanent child-parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such, it should be subjected to law enforcement rules.

should be held to the same standards as these other governmental officials and juveniles should be free from searches by any of these officials unless there is probable cause for the search, whether the search is conducted in school or out of school.¹⁷ Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976); State v. Mora, 307 So. 2d 317 (La.), vacated and remanded, 423 U.S. 809 (1975), on remand, 330 So. 2d 900 (La. 1976). See State v. Walker, 528 P.2d 113 (Or. Ct. App. 1974); People v. Cohen, 57 Misc. 2d 366, 292

17. The use of a standard lower than probable cause for the search of a juvenile in school has been severely criticized by commentators. See, e.g., Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739 (1974); Cotton and Haage, "Students and the Fourth Amendment: 'The Torturable Class,'" 16 U. Calif. D.L. Rev. 709 (1983); Reder, "School Officials' Authority to Search Students is Augmented by the In Loco Parentis Doctrine," 5 Fla. St. L. Rev. 526 (1977); Schiff, "The Emergence of Student Rights to Privacy Under the Fourth Amendment," 34 Baylor L. Rev. 209 (1982); Trosch, Williams and DeVore, "Public School Searches and the Fourth Amendment," 11 J.L. & Educ. 41 (1982).

N.Y.S.2d 706 (Dist. Ct. 1968); State v. McKinnon, 558 P.2d 781 (Wash. 1977)(Rosellini, J., dissenting). See also Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich 1975); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

V. ALTHOUGH THE NEW JERSEY SUPREME COURT HELD THAT SCHOOL OFFICIALS DO NOT HAVE TO SATISFY THE PROBABLE CAUSE REQUIREMENT IN ORDER TO SEARCH A STUDENT, THE STANDARD ESTABLISHED BY THAT COURT AT LEAST WOULD CONSTITUTIONALLY PROTECT STUDENTS FROM ARBITRARY SEARCHES BY SCHOOL OFFICIALS

The New Jersey Supreme Court held that a school official, as a governmental agent, has the right to conduct a reasonable search for evidence when the school official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." State in Interest of T.L.O., 94 N.J. 331, 346 (1983).

This decision is supported by a significant number of other lower court cases, which have applied the same or a similar standard.¹⁸

The standard set out in the New Jersey Supreme Court's opinion, which is a lower standard than this Court's decisions indicate is required, attempts to balance the need of school officials to conduct reasonable searches of students in school with the right of students to be free from unreasonable

18. See, e.g., Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982); Bilbrey v. Brown, 481 F. Supp. 26 (D. Or. 1979); In re W., 29 Cal. App. 3d 777 (Ct. App. 1973); In re C., 102 Cal. Rptr. 682 (Ct. App. 1972); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); State v. F.W.E., 360 So. 2d 148 (Fla. Dist. Ct. App. 1978); People v. Ward, 233 N.W.2d 180 (Mich. Ct. App. 1975); Doe v. State, 540 P.2d 827 (N.M. Ct. App. 1975); People v. Singletary, 333 N.E.2d 369 (N.Y. 1975); People v. D., 315 N.E.2d 466 (N.Y. 1974); People v. Jackson, 319 N.Y.S.2d 731 (App. Div. 1971), aff'd, 284 N.E.2d 153 (N.Y. 1972); State v. McKinnon, 558 P.2d 781 (Wash. 1977); In re L.L., 280 N.W.2d 343 (Wis. Ct. App. 1979).

searches and seizures. The application of this standard also at least would prevent arbitrary and capricious searches by school officials and provide school officials with a common sense guideline for searching a student.

Certainly, school officials do not need, and undoubtedly would not want, the unbridled discretion to search students in any manner, at any time, and for any reason. Not only would it be the rare school administrator who would want to search a student without "reasonable grounds" to believe that the student possesses evidence of wrongdoing, but the United States Constitution mandates that at least such minimal protection be afforded to juveniles.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court apply the probable cause standard to the search and seizure of a juvenile by a school official or, in the alternative, affirm the decision of the New Jersey Supreme Court.

Respectfully submitted,

BARRY S. GOODMAN
CRUMMY, DEL DEO, DOLAN & PURCELL
A Professional Corporation
Attorneys for Amici Curiae
Gateway I
Newark, New Jersey 07102

Dated: February 16, 1984

Of Counsel:

Charles S. Sims, Esq.
Deborah Karparkin, Esq.

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No. 83-712

IN THE
Supreme Court of the United States

October Term, 1983

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION TO APPEAR AS AMICUS CURIAE, AND
BRIEF AMICUS CURIAE IN SUPPORT
OF PETITIONER

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson Street, N.W., #600
Washington, D.C. 20007
(202) 337-7666

AUGUST W. STEINHILBER
Associate Executive Director and
Legal Counsel
National School Boards Association

THOMAS A. SHANNON
Executive Director
National School Boards Association

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GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson Street, N.W., #600
Washington, D.C. 20007
(202) 337-7666

AUGUST W. STEINHILBER
Associate Executive Director and
Legal Counsel
National School Boards Association

THOMAS A. SHANNON
Executive Director
National School Boards Association

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The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae herein, for the purpose of filing the attached brief in support of the Petitioner. Counsel for the parties have not consented.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

This case arises out of an effort by school officials to deal with discipline and drugs in the school -- issues which are of major concern to school districts throughout the country, as well as to the parents of the children who are entrusted to the schools' care.

However, the parties in this action are

concerned solely with the issue of the admissibility in a quasi-criminal proceeding of evidence procured through a school search. The parties are unlikely to bring to the attention of this Court the important considerations of school discipline and the education and safety of public school children. Amicus believes that to reach a workable solution in the instant case these considerations should be addressed by this Court.

The precedent that will be set by this Court in the case at bar will affect the ability of school officials nationwide to carry out their appointed tasks -- educating students, instilling values and protecting them from harm in the schools.

The Court could decide this case on the narrow evidentiary issue presented by the parties. However, given the problem of crime, drugs and discipline in the schools today,

amicus urges this Court to look at the broader picture.

Regardless of how the Court's rules in this case, its decision will have a direct impact on school districts throughout the country. Thus, the National School Boards Association urges this Court to grant it leave to present its views.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy Legal Counsel
National School Boards Association
1055 Thomas Jefferson Street, N.W., #600
Washington, D.C. 20007
(202) 337-7666

AUGUST W. STEINHILBER
Associate Executive Director and
Legal Counsel
National School Boards Association

THOMAS A. SHANNON
Executive Director
National School Boards Association

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

State of New Jersey,
Petitioner,

v.

T.L.O., a Juvenile,
Respondent.

AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school

boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The problems of drugs and crime in the schools and of school discipline in general are of major concern to school districts throughout the country, as well as to the parents of the children who are entrusted to the care of the districts.

School boards across the country are concerned that decisions such as that of the court below will seriously undermine their ability to enforce school rules and discipline in a manner which will neither endanger the innocent nor result in life-long criminal stigmas for the guilty.

Amicus is also concerned about the precedent in this case which, although technically involving only criminal standards, will be applied by lower courts to purely

civil matters involving school discipline.

ISSUE PRESENTED FOR REVIEW

Whether the Fourth Amendment to the United States Constitution, U.S. Constit., amend. IV, applies to searches of students by school officials conducted for the purpose of enforcing school rules?

ARGUMENT

I. INTRODUCTION

The petition for a writ of certiorari presents for this Court's review the question of whether the exclusionary rule developed under the Fourth Amendment applies to searches conducted by public school officials and teachers in the school. Before that issue is reached, however, it is the firm belief of amicus National School Boards Association that a more important threshold question must first be addressed -- whether the Fourth Amendment

is even applicable to searches conducted by school officials in the context of enforcing school rules and maintaining order and discipline. Because of the need to maintain discipline and protect children compelled by law to be present in the schools, amicus submits that the Fourth Amendment's standards should not be transplanted by the courts from the criminal enforcement context into the classroom.

II. SCHOOL SEARCHES ARE A NECESSARY TOOL FOR MAINTAINING DISCIPLINE, ORDER AND SAFETY

Every state in this nation mandates, in one form or another, that children of certain prescribed ages attend school. P. Lines, "Private Education Alternatives and State Regulation," Education Commission of the States (1982). Faced with compulsory attendance laws, parents across the country entrust their children to the care of the schools, expecting the schools not only to

educate but also to protect the students in their custody. Unfortunately, however, schools are being confronted by a rising tide of drugs, weapons, and disorderly conduct that makes their protective duties more and more difficult. School searches are a vital tool in the struggle to protect other students from dangerous instrumentalities such as weapons and drugs, and to enforce school rules in a fair, certain and immediate fashion.

Recent estimates show that nearly three million school children may be the victims of crime each month. See Appendix A. Though students between the ages of 12 and 19 spend only about 25% of their waking time in school, it is estimated that 36% of all assaults and 40% of all robberies against this group occur while they are in school. National Institute of Education, Violent Schools--Safe Schools: The Safe School Study Report to the Congress 31-32 (1978). Ironically, it would almost

appear that students are safer on the streets than in the classroom.

Nor are the effects of crime in the school limited to purely physical factors. Students living in an atmosphere of fear cannot possibly receive the full benefits of their education. Surveys show that 4% of students may stay home from school each month because of their fear of becoming yet another victim of crime in the schools. See Appendix B.

Certainly, it is not the intent of amicus to convey the impression that schools are nothing more than armed camps. They are not. However, the efforts undertaken by schools attempting to alleviate the problem are continually being thwarted by judicial decisions such as that of the court below.

Schools are not only in the business of instilling book learning, but also of teaching moral values and discipline through the

orderly, certain, and immediate implementation of school rules. The student infringing school rules benefits little by having his or her conduct ignored and even less by having it referred to the criminal justice system. The ideal way to handle the matter is to show the students that their violations of school rules will lead to immediate and certain action against them by school authorities. They must be taught that rules are to be obeyed or immediate consequences will follow. Students are children, not adults, and need and want this type of certainty in their lives.

Unfortunately, today's criminal justice system is neither certain nor immediate. If anything, the criminal justice system teaches students that the law protects the wrongdoer. This is not to say that the criminal justice system is invalid, especially when applied to accused criminals faced with a possible loss of liberty. But the rules in effect for that

system have no place in the public schools, which should operate in much the same manner as parents operate their disciplinary system at home.

According to one study, only three percent of the referrals to juvenile courts come from the schools. Report to the Nation on Crime and Justice 60 (1983). It is clear that schools are attempting to deal with the problem of crime internally, through the usual procedures available to them -- procedures which in the past have included searches of students' purses, pockets and lockers. They are acting not as surrogates for the criminal justice system, but rather, as surrogates for the parents, teaching the difference between right and wrong:

In the school, as in the family, there exists on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity

to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law Interest of L.L., 280 N.W.2d 343, 349, citing State ex rel Burpee v. Burton, 45 Wis. 150, 155 (1878).

Similarly, in the case at bar, the principal who searched the student was less interested in getting evidence to support a school disciplinary proceeding or a criminal investigation than in expressing his displeasure with the lie the student was telling him by claiming not to smoke although she had cigarettes in her purse. The court below, unfortunately, concerned itself with criminal justice concepts of "plain view" and the fact that the principal, upon being told by the student that she didn't smoke, searched her purse and removed a package of cigarettes. Thus the court, using search standards established in the criminal setting, reasoned that the principal had no cause for his actions. The school's real interest,

however, which went unrecognized by the court, was in instilling the virtue of telling the truth, not in obtaining evidence for a criminal prosecution. Thus, standards such as "plain view" should not even have been brought to bear.

It is important that courts understand that the education system is not a court, not a police station, and that school officials are not law enforcement agents. Respect for the laws of the land and for the rules of the school is important for all students to learn. Strict enforcement of school rules is the surest and least obtrusive means for achieving respect, and the methods, including searches, should be left to the educators, not the courts.

III. THE FOURTH AMENDMENT WAS NOT INTENDED TO APPLY IN THE SCHOOL SETTING

Apart from the special needs of school officials to educate and protect students

entrusted and compelled to be in their care, the history of the Fourth Amendment provides further support for the belief of amicus that the Fourth Amendment's prohibitions have no place in the classroom.

The Fourth Amendment was originally formulated in response to the general warrants in England and the writs of assistance in the Colonies, which gave the holder broad power, for life, to search and seize property at will. W. Ringel, Searches and Seizures, Arrests and Confessions 2-3 (1972). The first mention of the colonists' displeasure with then prevalent search and seizure practices appears in the writings of Samuel Adams, who in 1772 helped compile a report on the "Rights of the Colonists and a List of Infringements and Violations of Rights." The venom of the people against the writs and those executing them is eloquently expressed by Adams:

Thus, our houses and even our
bedchambers are exposed to be

ransacked, our boxes chests and trunks broke open ravaged and plundered by wretches whom no prudent man would venture to employ even as menial servants Those Officers may under colour of law and the cloak of a general warrant break thro' the sacred rights of the Domicil, ransack mens houses ... and with little danger to themselves commit the most horred murders. Adams, "The Rights of the Colonists and A List of Infringements and Violations of Rights," in 2 The Writings of Samuel Adams 350-69, (H.A. Cushing 1906).

James Madison's original proposal for the Fourth Amendment similarly concerned itself with warrants and the home, and did not even mention more general "unreasonable searches and seizures," but only that "the right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause" An amendment during House debate on the Bill of Rights added the language relating to "unreasonable searches and seizures." 1 Annals of Congress 685-792 (August 17, 1789).

Originally, courts held that the Fourth Amendment's prohibitions did not apply to searches conducted by state officials, but only to federal authorities. Federal officials would thus attempt to circumvent search and seizure rules by having state authorities present to them "on a silver platter" evidence illegally obtained for use in federal court prosecutions, a practice which came to a halt with this Court's decision in Elkins v. United States, 364 U.S. 206 (1960). Ultimately, in Mapp v. Ohio, 367 U.S. 643 (1961), this Court held that the Fourth Amendment is incorporated into the Fourteenth Amendment and thus applies to state as well as federal officials. Of course, all of these cases arose out of searches conducted by law enforcement officials for the purpose of obtaining criminal convictions.

Running throughout the cases interpreting the Fourth Amendment are several consistent

threads. Though decisions interpreting the Fourth Amendment have extended its protections from the home to motor vehicles and other areas, in each instance, it can be argued that there is a high expectation of privacy, an expectation which does not exist in the school setting. Further, even cases which do not involve criminal justice officials such as policemen do involve law enforcement agents of one type or another. See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967). These law enforcement officials, like police officers, are primarily devoted to the cause of detecting violations of the law, unlike school officials, for whom such activities are a mere adjunct to their primary duty of educating and caring for the children in their charge.

This "legislative history" and the distinctions drawn above are vital to an equitable resolution of the case at bar. This

Court need not overrule its earlier decisions to hold here that there is no Fourth Amendment right in the schools where a search is conducted to enforce school rules and maintain order, rather than to hand over evidence to law enforcement officials "on a silver platter." It is clear that the Fourth Amendment was intended to protect accused persons from unreasonable criminal or quasi-criminal procedures, not students being taught the difference between right and wrong.

IV. CRIMINAL JUSTICE STANDARDS ARE NOT TRANSFERABLE TO THE SPECIAL SETTING OF THE SCHOOL

Lower courts have attempted, as did the lower court in the case at bar, to adopt lesser standards of "reasonable" in determining whether a violation of the Fourth Amendment has occurred. However, the standards are difficult, if not impossible, to apply in the educational setting, particularly

since the standards are designed for the criminal context but must be applied in a civil context.

Several state courts have articulated a standard of "reasonable suspicion," a standard traceable to this Court's decision in Terry v. Ohio, 392 U.S. 1 (1968). Terry, however, involved a criminal search, and attempts to apply such standards in the school discipline context often results in arbitrary and unpredictable decisions.

For example, in People v. Singletary, 37 N.Y.2d 311, 333 N.E.2d 369 (1975), a New York court upheld the search of a student as the result of a tip from another student who had identified drug offenders on five previous occasions. But the same court, in People v. D., 34 N.Y.2d 483, 315 N.E.2d 466 (1974), refused to find "reasonable suspicion" to justify a search on the basis of a "confidential source," and observations of the

student making two brief trips to the bathroom, each time with two different students. Other inconsistent interpretations of "reasonable suspicion" can be found in State v. Baccino, 282 A.2d 869 (Del. Super. 1971); W.J.S. v. State, 409 So.2d 1209 (Fla. App. 1982); State v. Feazell, 360 So.2d 907 (La. App. 1978); and L.L. v. Circuit Court of Washington County, 90 Wis.2d 585, 280 N.W.2d 343 (1979).

The court below cites a standard adopted in earlier cases, calling for school officials, before conducting a search, to consider "the child's age, history and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." New Jersey v. T.L.O., 463 A.2d 934, 942 (1983) (citations omitted).

Yet in applying the standard it discounts as unreasonable the fact that the principal had been observing Engerund for some time and that a teacher had seen T.L.O. smoking in the restroom, because these observations do not squarely fit into criminal justice standards on anonymous tips and probable cause.

Such standards would be well utilized if the school official was acting as a law enforcement officer. But school officials are primarily educators, not enforcers and act to protect the other children in their charge, as well as to ensure that school regulations and order are maintained. If there is only a rumor that a child is carrying a gun -- that child should be searched immediately, regardless of whether the suspicion is reasonable as that term is used in the criminal context. For example, in March of 1983, two third-grade students were found with a fully-loaded .45-caliber gun inside one of

the students' desks. Miami Herald, 3/10/83, p. 1C. Should schools be prohibited from searching for weapons merely because they lack probable cause sufficient to obtain a criminal warrant? Of course not. No harm is done if the search is to no avail, but a child's life may have been saved if the search produces a weapon.

The mechanistic rules of the criminal context simply have no place in the setting of the school and the classroom. Rules such as the "clear view" doctrine, cited by the court below, and the "reasonable suspicion" standard which has been suggested as a substitute for probable cause, are all unnecessarily rigorous. As stated by the Georgia Supreme Court in State v. Young, 234 Ga. 488, 496, 216 S.E.2d 586, 592 (1975): "Teachers and administrators must be allowed to search without hindrance or delay subject only to the most minimal restraints necessary to insure

that students are not whimsically stripped of personal privacy and subjected to petty tyranny."

Teachers in a classroom are charged with the responsibility of maintaining order. Although one suspected of a crime could not (without probable cause) be ordered by a police officer to empty his pockets or open her purse, surely our forefathers did not intend to require a teacher to meet criminal standards of probable cause or even "reasonable suspicion" in order to look through a child's desk for the slingshot which sent a stone at another, or for the gum being chewed against school rules. Surely our forefathers did not intend the Fourth Amendment to require probable cause or reasonable suspicion before a principal could open a student's locker in the search for a gun reported by an anonymous tip to be there. Should our school officials be forced to wait

until drugs are sold or a child is harmed before they are allowed to take action?

Just as school authorities view corporal punishment as a less drastic means of discipline than suspension or expulsion, Ingraham v. Wright, 430 U.S. 651, 657 (1977), so school authorities view the informal enforcement of school rules through searches, discussions with the student, and even suspensions and expulsions as less drastic means of discipline than turning the schools into a criminal justice system with probable cause proceedings, formal advising of rights and calling in the police authorities, with the attendant permanent damage to the student such a process may entail. As one court, in praise of a school's efforts stated:

Without the intervention of law enforcement officers, and with little or no disruption of school activities or discipline, they conducted an informal investigation of the reported matter. Their information may not have proved to

be valid, but their action insured that the adverse effect on the student's well-being, on his present and future emotional reaction to the event, as well as on the several societal interests concerned, would be kept at a minimum. In re G., 11 Cal. App. 3d 1193, 1197 (1970).

In discounting the notion that school officials be viewed as standing in loco parentis rather than as officers of the state, the lower court notes that parents infrequently search their children and turn them over to the police for prosecution. New Jersey v. T.L.O., 463 A.2d at 938, n.4. Yet studies show that only about three percent of the referrals to juvenile courts come from the schools, the same percentage as are referred by parents. Report to the Nation on Crime and Justice 60 (1983).

The lower court in New Jersey v. Engerud, a companion case to T.L.O. mooted by the death of the student, noted that its opinion was not intended to "disparage the school officials'

actions in these cases. They must often, as here, act on short notice based on the information that they possess. Such officials have immunity from damages for claims resulting from their good faith judgments." The court cited Wood v. Strickland, 420 U.S. 308 (1975), to support its analysis on "good faith." However, other lower courts interpret the "good faith" test as applying only where the law in an area is unsettled, not where school officials subjectively believe their actions were correct. If the Fourth Amendment is applied to the schools, teachers and administrators will be subjected to damage actions where searches are held to be unreasonable, even though those officials believed in "good faith" that their actions were reasonable under the circumstances. In order to avoid such actions, school officials will simply stop making searches at all, which could have dire consequences for all children

-- the guilty as well as the innocent.

Certainly, no school official would seriously argue, in light of this Court's decisions, that students shed their constitutional rights "at the schoolhouse gate." Tinker v. Des Moines Independent Community School District, 343 U.S. 503 (1969). But in the context of the classroom, students have different rights than those persons being processed through the criminal justice system. The convicted felon has rights under the Eighth Amendment; the student does not. Ingraham v. Wright, 430 U.S. 651 (1977). Even Constitutional guarantees which are not directed toward the criminal justice system, such as those arising under the First Amendment, are very much different in the schoolhouse setting. See Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982).

Both precedent and common sense dictate a

determination by this Court that portions of the Constitution, specifically the Fourth Amendment, are neither necessary nor applicable in the context of maintaining school discipline.

V. STUDENT LOCKERS ARE NOT PROTECTED BY THE FOURTH AMENDMENT

Although the companion case to this action, N.J. V. Engerud, is technically moot because of the death of the defendant, it is necessary to discuss that case in the context of any discussion of the Fourth Amendment's place in the schools. In that case, the court below determined that there was an "expectation of privacy" which the student possessed in his locker -- his "home away from home," -- and that school officials could therefore not search the locker without the student's permission.

The search of the locker was based on an anonymous tip and on the subjective suspicions

of the principal. The court applied the three prong test of Aguilar v. Texas, 378 U.S. 108 (1964), a criminal case, to determine the reliability of the tip, and held that it failed to meet that test. It is the position of amicus that it is simply inappropriate to require school officials attempting to maintain order and protect the well-being of the children entrusted to their care, to have to meet these types of tests, which are designed to protect the accused within the criminal justice system, not students in a school.

As noted above, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" United States v. United States District Court, 407 U.S. 297, 313 (1971). The lower court opinion to the contrary notwithstanding, the public school student's locker is not his castle, nor is there a reasonable expectation

of privacy in the school. Most other courts have held that since schools have control over student's lockers, there is no expectation of privacy in the lockers. See, e.g., Overton v. Rieger, 311 F. Supp. 1035 (S.D.N.Y. 1970); In the Matter of Christopher W., 105 Cal. Rptr. 775 (Ct. App. 1973); In re Donaldson, 75 Cal. Rptr. 220 (Ct. App. 1969); People v. Lanthier, 448 P.2d 625, 628 (Sup. Ct. Cal. 1971). See generally, Annot., Admissibility in Criminal Case of Evidence Obtained by Search Conducted by School Official or Teacher, 49 A.L.R.3d 978, 979. The New Jersey Supreme Court, however, has said that such an expectation of privacy does exist unless the school has a policy of regularly inspecting students' lockers. Thus, even if the school had a written policy to the effect that lockers could be opened at any time by school officials, it would probably still not be enough to meet the New Jersey court's

standard, without a regular inspection practice.

**VI. ALTERNATIVES EXIST TO THE FOURTH
AMENDMENT TO PROTECT STUDENTS'
CONSTITUTIONAL RIGHTS**

It has been argued that to exempt schools from the application of the Fourth Amendment would leave students with no remedy for gross acts by school officials against their person. That, of course, is not true. Amicus argues not for an exemption of the schools from the Constitution, only from its Fourth Amendment, which was not intended to and indeed should not apply in the classroom. Other Constitutional provisions would continue to protect students from severe abuses arising from searches. For example, where searches or punishment for infractions are discriminatory in application, the Equal Protection Clause may come into play. Where a particular search oversteps the bounds of necessity in a given

situation or otherwise "shocks the conscience of the Court," the student may assert a violation of liberty interests as well as common law remedies. The value of such alternatives can best be demonstrated by decisions such as Rochin v. California, 342 U.S. 165 (1951), a decision arising before the Fourth Amendment was found to apply to the states. In Rochin, this Court overturned a state conviction because the search (pumping the stomach of the defendant to recover morphine capsules) so "shocks the conscience" that it amounted to a denial of due process.

Thus, several lower court cases involving student searches might well have been successfully litigated under the due process clause. Strip searches of young children, where no danger to other children is involved, may be an example of conduct gross enough to raise constitutional implications. See, e.g., Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y.

1977). If, as stated by the court in Doe v. Renfrow, 631 F.2d 91, 92, reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981), "it does not require a constitutional scholar to conclude that [the search] is an invasion of constitutional rights of some magnitude," then the Rochin doctrine would clearly apply and there would be no need to resort to the Fourth Amendment to protect the student's rights.

Common law damage actions may also be an adequate remedy for gross violations resulting from searches of students' persons. In Ingraham v. Wright, 430 U.S. 651, this Court, in holding that the Eighth Amendment's proscription against "cruel and unusual punishment" does not apply to the schools, noted that the common law (and the state's statutory remedies) adequately protects students against abusive imposition of corporal punishment in the schools. The

rational of the Court in Ingraham applies equally to an analysis of the Fourth Amendment:

The openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. Id. at 670.

VII. CONCLUSION

In a recent Gallup Poll survey respondents were asked to name the biggest problems facing their public schools. They chose lack of discipline (named by 25% of respondents) and use of drugs (named by 18% of respondents) as the top two problems in the schools. Phi Delta Kappan, Sept., 1983.

School board members, school teachers, principals and other school officials are attempting to deal with this problem through internal procedures which will teach students, without imposing life-long criminal stigmas.

Judicial decisions such as that below, threaten to erode the ability of local school officials to carry out this mission by changing the long-standing relationship of student and teacher, and student and principal, from one revolving around a learning environment and the teaching of values to one of policeman and suspect. "Courts should not 'intervene' in the resolution of conflicts which arise in the daily operations of school systems' unless 'basic constitutional values' are 'directly and sharply implicated' in those conflicts."

Island Trees Union Free School District v. Pico, supra.

Clearly, the Fourth Amendment is not a Constitutional value which is directly or sharply implicated where a school principal is acting in the capacity of educator and supervisor of school discipline policies in the manner described in the case below. Where

school officials take on the role of surrogate law enforcement officer, a different rule might attach. That, however, is not the situation here. Here the school personnel were not taking on the role of "sovereign" where, according to Justice Rehnquist's analysis in Island Trees, supra, the Constitutional duties may be different. Instead, the personnel were acting in the role of "government as educator."

There is a need, in order to protect innocent students as well as to teach the guilty, for school personnel to have a free hand, within the bounds of good taste, to search the property of students within their charge. Such searches do not implicate Fourth Amendment considerations unless the school personnel are acting as surrogate law enforcement officers for the purpose of handing over evidence to the criminal justice system "on a silver platter."

Further, a finding that the Fourth Amendment does not apply to school administrative searches will not leave students unprotected. Should a search overstep the boundaries of good taste and "shock the conscience," other Constitutional and common-law rights would be implicated and students would have the full protection of the laws to seek damages or other relief against offending officials and the school district itself.

New "reports" and "studies" present simplistic solutions to the problem of crime in the schools, advocating more reporting, by the school of criminal activity on school property, and implying that less effort should be made to advise students of their rights. That is certainly not what is advocated by amicus. Amicus believes only that the Fourth Amendment does not apply in the context of school personnel enforcing school rules and

protecting the health and safety of students.

Amicus continues to believe that students do, and should, have Constitutional rights in the school. However, because of their youth, inexperience and their need for protection in the educational environment, society must not treat children in school in the same manner as criminal suspects are treated in the criminal justice system.

APPENDIX A**EXTENT OF CRIME AND VIOLENCE IN THE SCHOOLS**

In the only nationwide study released to date on the incidence of crime and violence in our nation's schools, it was found that, at a minimum, two and one-half million students are the victims of crime in America's public schools in a typical month. "Safe Schools--Violent Schools," The Safe School Study Report to Congress¹ a survey of over 4,000 schools, chronicles the extent of both student and teacher victimization in our schools. Among the findings:

- Eight percent of the nations schools are seriously affected by crime, violence, and disruption.
- Thirty percent of all assaults and 40% of all robberies reported by people age 12-19 occurred in school, although students spend only about 25% of their active time in school.

¹ National Institute of Education, Safe Schools--Violent Schools, The Safe School Study Report to Congress 1978). The study was undertaken in response to Congress's request that HEW determine the extent and seriousness of crime in the schools.

- One out of every 9 secondary school students, or 2.4 million have something worth more than \$1 taken from them in a month's time. Twenty percent of these thefts involved items valued over \$10.
- One out of every 75 secondary school students, or over one-quarter million, are attacked at school each month. Forty-two percent of these attacks involve some injury to the student, and 4% of these are serious enough to require medical treatment.
- One out of every 200 secondary school students have something taken from them by force, weapons, or threats in a typical month. Nine percent of these robberies involve injury to the student victim. Nearly one-quarter of these robberies involved losses over \$1.
- Twelve percent of secondary school teachers, or one out of every eight, reported having something worth more than \$1 stolen from them in a typical month. More than 20% of these thefts involved losses greater than \$10.
- About .5%, or one out of every 200 secondary school teachers is attacked each month. Nearly one-fifth of these attacks is serious enough to require medical treatment. A teacher has a five times as greater a chance as a student of being hurt if attacked.
- The odds of secondary school teachers having something taken from them by force, weapons, or threats at school in a typical month are 1 in 170. About one-fourth of these robberies involve losses of more than \$10.

APPENDIX B

CONSEQUENCES OF SCHOOL VIOLENCE

In addition to the far-reaching physical effects of school violence, wide ranging psychological consequences were also noted by the Violent Schools--Safe Schools study.

Among these:

- Twenty-two percent of all secondary students reported avoiding some restrooms at school because of fear.
- Sixteen percent avoiding three or more places at school because of fear.
- Twenty percent of the students said they are afraid of being hurt or bothered at school at least sometimes.
- Three percent reported that they are afraid most of the time.
- Four percent actually stayed home from school in the previous month because they were afraid.

In addition to the anxieties suffered by the students, teachers also expressed fear and trepidation arising out of school violence and hostile confrontations with students.

- Twelve percent of secondary school teachers said they had been threatened with injury by students at the school.
 - Twelve percent of the teachers said they hesitated to confront misbehaving students because of fear.
 - Almost half of the teachers reported that some students had insulted them or made obscene gestures at them in the last month.
- *SOURCE:** "Violent Schools--Safe Schools," The Safe School Study Report to the Congress, Vol. 1, p. 5. (1978).

MOTION FILED

JAN 12 1984

83-712

No. 83-72

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE A BRIEF
AS AMICUS CURIAE

PAULA A. MULLALY
Counsel of Record

General Counsel
New Jersey School
Boards Association
315 West State Street
P.O. Box 909
Trenton, New Jersey 08605
(609) 695-7600

LLOYD NEWBAKER
Executive Director
New Jersey School
Boards Association

THOMAS F. SCULLY
Assistant Counsel
New Jersey School
Boards Association

IN THE
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October Term, 1983

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE A
BRIEF AS AMICUS CURIAE

The New Jersey School Boards
Association has moved the Court for leave
to appear as amicus curiae herein for the
purposes of filing the attached brief.

Consent to file this brief has been
obtained in writing from Lois DeJulio,
First Assistant Deputy Public Defender,
State of New Jersey and telephone consent
initially was believed to be received from
the Attorney General. (Affidavits

attached).

Respectfully submitted,

Paula A. Mullaly

Paula A. Mullaly
General Counsel to
New Jersey School
Boards Association

Thomas F. Scully

Thomas F. Scully
Assistant Counsel to
New Jersey School
Boards Association

No. 83-72

IN THE
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State of New Jersey,
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T.L.O., a Juvenile,
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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

MEMORANDUM OF THE NEW JERSEY
SCHOOL BOARDS ASSOCIATION IN
SUPPORT OF MOTION FOR LEAVE
TO FILE BRIEF AS
AMICUS CURIAE

The New Jersey School Boards
Association has moved this Court for leave
to appear as amicus curiae herein for the
purposes of filing the attached brief.
While consent was received from the Public
Defender Appellate Section, the Association
was unable to receive formal consent from
the Attorney General, although initial
phone conversations indicated such

was forthcoming.

Amicus curiae, New Jersey School Boards Association, is a statutory, nonprofit organization, comprised of approximately 600 Boards of Education in the State of New Jersey. N.J.S.A. 18A:6-45. The bylaws of the Association cite as major objectives to encourage and aid all movements for the improvement of educational affairs of the state and the betterment and welfare of the children. The issue before this Court impacts dramatically on individual boards of education and their employees and students. Resolution of the issues before this Court will dictate the actions which any board of education and its agents may take in efforts to maintain discipline and safety within the schools of their district. It is, therefore, imperative that the New Jersey School Boards Association participate in this case and effectively argue on behalf of their

membership.

The applicability of the exclusionary rule and the standards to which school officials must conform in the maintaining schools are the issues this Court has elected to address. The New Jersey School Boards Association has adopted the following policy with respect to these issues:

The New Jersey School Boards Association recognizes that public school students have the constitutional right to be free from unreasonable searches and seizures by any person acting in an official capacity on behalf of a local school district. It is believed to be best for all parties concerned if the search of a student by a school official were permissible, only where the official had a reasonable suspicion that a school rule or a state law was being violated.

With this policy position as a base, amicus will urge the Court to take a novel approach to the exclusionary rule controversy, and in so doing properly balance the competing interests at stake in this matter.

No. 83-72

IN THE
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State of New Jersey,
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v.

T.L.O., a Juvenile,
Respondent.

AFFIDAVIT

STATE OF NEW JERSEY,
COUNTY OF MERCER

SS.

Thomas F. Scully, of full age being
duly sworn according to law upon his oath
deposes and says:

1. I am Assistant Counsel to the New
Jersey School Boards Association
[hereinafter the Association], a non-profit
corporation created by the New Jersey
Legislature, pursuant to N.J.S.A. 18A:6-45
et seq.

2. On January 18, 1983, the New
Jersey Supreme Court granted the

Association's motion to participate as amicus curiae, solely by the filing of a brief, In the Matter of T.L.O.

3. On August 8, 1983, the New Jersey Supreme Court issued its ruling in said case. This holding represents an adoption of the position argued by the Association.

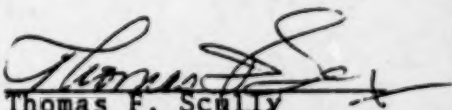
4. The Association requests the consent of the parties for leave to participate in New Jersey v. T.L.O., No. 83-712, as amicus curiae.

5. On Thursday, December 8, 1983, the Office of the New Jersey Public Defender informed me by telephone that they would consent to the Association's participation as amicus curiae in said case. On December 12, 1983 the Association received written confirmation of this consent. (Appendix C).

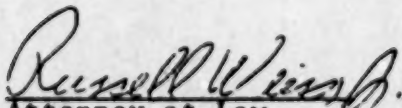
6. On Monday, December 12, 1983, pursuant to a telephone conversation I had with Alan J. Nodes, Deputy Attorney General, attorney for the petitioner, it was

my understanding that consent would be granted and I was instructed to provide Mr. Nodes with a consent form for the Association to participate as amicus curiae.

7. On Tuesday, December 20, 1983 I was advised by Mr. Nodes in a telephone conversation that we would receive a written statement on the Attorney General's response to our request. This response has not yet been received.


Thomas F. Scully
New Jersey School
Boards
Association

Sworn and
Subscribed to
before me
this 6th day
of January,
1984.


Attorney at Law
State of New Jersey

No. 83-72

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

AFFIDAVIT

STATE OF NEW JERSEY,
SS.
COUNTY OF MERCER

Paula A. Mullaly, of full age being
duly sworn according to law, upon her oath
deposes and says:

1. I am the Assistant Executive
Director/General Counsel to the New Jersey
School Boards Association, [hereinafter the
Association], a non-profit corporation
created by the New Jersey Legislature,
pursuant to N.J.S.A. 18A:6-45 et seq.

2. All district boards of education
in the State are compelled to be members of

the Association. The Association is charged with the duty to "encourage and aid all movements for the improvement of the educational affairs of th[e] State."

N.J.S.A. 18A:6-47.

3. The Association is governed by a Board of Directors, duly elected by its membership, as set forth in the Bylaws of the New Jersey School Boards Association, Article VII. (Appendix A). On September 10, 1982, the Board of Directors adopted a policy on school searches, which states:

The NJSBA recognizes that public school students have the constitutional right to be free from unreasonable searches and seizures by any person acting in an official capacity on behalf of a local school district. The Association believes that it is best for all parties concerned if a search of a student by a school official is conducted only where the official has a reasonable suspicion that a school rule or state law is being violated.
(File Code 5142.12)

4. On January 18, 1983, the New Jersey Supreme Court granted the

Association's motion to participate as amicus curiae, solely by the filing of a brief, In the Matter of T.L.O. (Appendix B).

5. On August 8, 1983, the New Jersey Supreme Court issued its ruling in said case, holding that school district personnel may conduct student searches whenever there is a "reasonable suspicion" that illegal substances or activities are present. In so holding, the Court adopted the position argued by the Association.

6. Pursuant to this Court's granting of the State of New Jersey's petition for certiorari, and R.36 of the United States Supreme Court Rule, I requested consent from the parties for leave to participate in New Jersey v. T.L.O., No. 83-712, as amicus curiae.

7. On Thursday December 8, 1983, the office of the New Jersey Public Defender granted its consent in a telephone

conversation between Lois A. DeJulio, Esq., attorney for respondent, and Thomas F. Scully, Esq., Assistant Counsel, New Jersey School Boards Association, for the Association's participation as amicus curiae in the said case. On December 12, 1983 the Association received written confirmation of this consent. (Appendix C).

8. On Monday, December 12, 1983, pursuant to a telephone conversation between Alan J. Nodes, Deputy Attorney General, attorney for petitioner, and Thomas F. Scully, Esq., Assistant Counsel, New Jersey School Boards Association it was my understanding that the Attorney General's Office had consented to the Association's participation as amicus curiae in the said case.

9. On Friday, December 16, 1983, pursuant to a telephone conversation between myself and Victoria Curtis Bramson, Deputy Attorney General, attorney for the

petitioner, I was advised that the Attorney General's office would not grant their consent to the Association's participation as amicus curiae in the said case. In the course of that conversation, I was advised that consent was being withheld due to the Association's differing position from that of the State regarding the application of the exclusionary rule.

10. On December , 1983 the Association received written notice from Irwin I. Kimmelman, Attorney General of New Jersey, that the State was withholding its consent for the Association's participation as amicus curiae in that the matter was an issue of police enforcement and that the Association had no interest in the said case. (Appendix D).

11. The Association is bringing the within motion for leave to participate as amicus curiae before this Court based upon the firm belief that the decision rendered

in this matter will impact on school operations throughout the United States and more specifically, directly impact upon the operation and policies of the members of the New Jersey School Boards Association.

Paula A. Mullaly
Paula A. Mullaly
New Jersey School
Boards
Association

Sworn and
Subscribed to
before me
this 6th day
of December,
1983.

Richard W. Wiser, Jr.
Attorney at Law
State of New Jersey

No. 83-72

IN THE
Supreme Court of the United States
October Term, 1983

State of New Jersey,
Petitioners,

v.

T.L.O., a Juvenile,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

AMICUS CURIAE BRIEF OF THE NEW
JERSEY SCHOOL BOARDS ASSOCIATION

PAULA A. MULLALY
Counsel of Record

General Counsel
New Jersey School
Boards Association
315 West State Street
P.O. Box 909
Trenton, New Jersey 08605
(609) 695-7600

LLOYD NEWBAKER
Executive Director
New Jersey School
Boards Association

THOMAS F. SCULLY
Assistant Counsel
New Jersey School
Boards Association

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PROCEDURAL HISTORY

On March 7, 1980 a complaint (JD-1322-80) was filed in Middlesex County Court alleging that juvenile T.L.O. possessed marijuana with intent to distribute, in violation of N.J.S.A. 24:21-19(a)(1) and N.J.S.A. 24:21-20(a)(4). Pursuant to published disciplinary procedures, Piscataway High School administratively suspended T.L.O. for ten days.

T.L.O., by her parents, filed a motion in Superior Court, Chancery Division, to show cause why T.L.O. should not be reinstated in school prior to the hearing on the juvenile delinquency complaint.

On March 23, 1980, the Chancery Division upheld the suspension for smoking cigarettes, however vacated the suspension which had been imposed for possession of marijuana. The Court found that the evidence obtained in the warrantless search of the purse was obtained in violation of

T.L.O.'s rights under the Fourth and Fourteenth Amendments to the United States Constitution.

On September 26, 1980 the Middlesex County Juvenile and Domestic Relations Court denied motions to dismiss the complaint and suppress all evidence obtained as a result of the search. The issue involving the suppression of the evidence was relitigated and the search was determined by the Juvenile and Domestic Relations Court to be proper. State in the Interest of T.L.O., 178 N.J. Super. 329, 342-345 (J.D.R. 1980).

On June 18, 1980 a complaint (JD-2717-80) was filed in the Middlesex County Court charging T.L.O. with larceny of under \$220.00 from the residence of Rosemarie Cole.

On December 22, 1980 a complaint (JD-83-81) was filed in Middlesex County Court charging T.L.O. with possession of

less than 25 grams of marijuana on school property.

On March 21, 1980, T.L.O. was prosecuted under the original complaint before Judge Nicola, Presiding Judge of the Middlesex County Juvenile and Domestic Relations Court. She was found guilty of possession of marijuana with the intent to distribute.

On June 2, 1981, T.L.O. entered pleas of guilty to all charges contained in complaints JD-83-81 and JD-2717-80.

On January 8, 1982, Judge Nicola imposed a probationary term of one year upon the condition that T.L.O. observe a reasonable curfew, attend school regularly and successfully complete a counseling and drug therapy program.

On February 11, 1982 a Notice of Appeal from the final adjudication of delinquency was filed in the State of New Jersey, Superior Court, Appellate Division. The

Appellate Division affirmed the denial of the motion to suppress, remanded the matter for further proceedings regarding the sufficiency of the Miranda waiver and vacated the final adjudication of delinquency entered on January 7, 1982 and remanded the matter for further proceedings.

On July 16, 1982, T.L.O. filed a notice of appeal to the New Jersey State Supreme Court as a matter of right, based on Judge Joelson's dissent at the Appellate Division level.

On January 27, 1983, the New Jersey Supreme Court granted the New Jersey School Boards Association's motion for leave to file a brief and argue amicus curiae.

On August 8, 1983, the Supreme Court of the State of New Jersey reversed the lower courts and suppressed all evidence obtained in the search of T.L.O.'s purse.

STATEMENT OF FACTS

On the morning of March 7, 1980, a Piscataway High School teacher observed T.L.O., a juvenile, and a girl named Johnson holding what appeared to be lit cigarettes in the girl's lavatory. The teacher escorted the girls to the assistant vice principal's office and accused the girls of violating the school's no-smoking regulations. The assistant vice principal asked the girls whether they had, in fact, been smoking cigarettes. Miss Johnson admitted to smoking and was assigned to attend the school smoking clinic for three days pursuant to school disciplinary policy. T.L.O. adamantly denied smoking. The assistant vice principal instructed T.L.O. to go into a private office rather than punishing her. Once inside the office he requested to see the student's purse. Upon opening it, he observed a pack of Marlboro cigarettes. After admonishing

T.L.O. for lying to him, he removed the cigarettes from the purse and observed cigarette rolling papers. Based on his experience he determined that the rolling papers were used in connection with marijuana smoking. A further inspection of the purse revealed marijuana, a metal pipe, a list of people owing T.L.O. money and forty single dollars and ninety-eight cents. A letter from T.L.O. to a friend requesting her to sell marijuana in school.

The assistant vice principal telephoned T.L.O.'s mother and summoned the police. After a conversation at the school, T.L.O. and her mother, at the request of police, went to police headquarters, where after being advised of her rights, T.L.O. admitted to selling marijuana in school. She told the police that she had sold 18 to 20 marijuana cigarettes at school that morning at the price of \$1.00 per marijuana cigarette.

T.L.O. was suspended for three days for smoking cigarettes on school property in an undesignated area. She was suspended an additional seven days for possession of marijuana. The police officer who questioned her drafted a complaint charging the juvenile with possession of marijuana with intent to distribute.

AMICUS CURIAE BRIEF OF THE
NEW JERSEY SCHOOL BOARDS
ASSOCIATION

INTEREST OF AMICUS CURIAE

Amicus curiae, New Jersey School Boards Association, is a statutory, nonprofit organization, comprised of approximately 600 Boards of Education in the State of New Jersey. N.J.S.A. 18A:6-45. The bylaws of the Association cite as major objectives the encouragement of and aid to all movements for the improvement of educational affairs of the state and the betterment and welfare of the children. The issue before this Court impacts dramatically on individual boards of education and their employees and students. Resolution of the issues before

this Court will dictate the actions which any board of education and its agents may take in efforts to maintain discipline and safety within the schools of their district. It is, therefore, imperative that the New Jersey School Boards Association participate in this case and effectively argue on behalf of its membership.

ISSUE PRESENTED FOR REVIEW

THE EXCLUSIONARY RULE IS
INAPPLICABLE TO SEARCHES CONDUCTED
BY SCHOOL OFFICIALS IN GOOD FAITH.

The applicability of the exclusionary rule and the standards to which school officials must conform in maintaining safety and discipline in the schools are the issues this Court has elected to address. The New Jersey School Boards Association has adopted the following policy with respect to these issues:

The New Jersey School Boards
Association recognizes that public
school students have the

constitutional right to be free from unreasonable searches and seizures by any person acting in an official capacity on behalf of a local school district. It is believed to be best for all parties concerned if the search of a student by a school official were permissible only where the official had a reasonable suspicion that a school rule or a state law was being violated.

-3-

With this policy position as a base, amicus will urge the Court to take a novel approach to the exclusionary rule controversy, and in so doing properly balance the competing interests at stake in this matter.

In determining the applicability of the Exclusionary Rule to student searches, a preliminary examination of the constitutional rights of students is necessary. The Fourth Amendment was designed to protect persons against unreasonable searches by government officials, both federal and state. Mapp v. Ohio, 367 U.S. 643 (1961). The

protections, however, do not extend to searches conducted by private citizens. Bardeau v. McDowell, 256 U.S. 465 (1921).

This Court has clearly held that children are persons for the purposes of exercising First Amendment Rights. Tinker v. Des Moines School District, 343 U.S. 583 (1969). If children are entitled to all the First Amendment rights that adults enjoy, it necessarily follows that they are entitled to the same Fourth Amendment rights. There is no reasonable distinction which can be drawn between the rights of citizens to free speech and the right to be free from unreasonable searches.

While the status of school officials as government officials has been a recurrent issue before the courts, existing case law in the State of New Jersey clearly identifies them as such for constitutional purposes. Durgin v. Brown, 37 N.J. 189 (1962); State in the Interest of G.C., 121

N.J. Super. 188 (J.D.R. 1972) Numerous state and federal courts have reached the same conclusion. Tinker v. Des Moines School District, supra, State v. Baccino, 282 A.2d 869 (Del. Super. 971). The New Jersey State Legislature has similarly recognized school officials as government officials by empowering them with the authority to maintain an orderly, disruption-free atmosphere in which students may receive their legislatively-mandated right to a thorough and efficient education. N.J. Constitution, 1947, Article 8, Sec. , par. 1; N.J.S.A. 18A:26-2; N.J.S.A. 18A:38-31.

The New Jersey Supreme Court below properly determined that students possess Fourth Amendment protections as they relate to searches conducted by school officials. State in Interest of T.L.O. 94 N.J. 331 (1983). Moreover, the court correctly distinguished between the standard to be

applied to police officers when determining the reasonableness of search and that which must be applied to a school official.

Accordingly, it developed a less stringent standard than the probable cause standard necessary to legitimize searches conducted by police officers. The Court in T.L.O., in identifying this standard, held:

We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, the school official has the right to conduct a reasonable search for such evidence."
T.L.O., supra, at 346.

Amicus urges this Court to adopt a similar approach in determining a standard of reasonableness and to recognize the inherent difference between the role of a police officer and that of a school official. Unlike school officials, police officers are provided with substantial training in the procedure for search and

seizure prior to serving on a police force. This knowledge and understanding is reinforced and refined during the course of the officer's career because of his continuing need to deal objectively with crime. It is, therefore, only sensible to impose a strict standard of reasonableness for searches conducted by police officers. The motivations and mechanisms to provide and maintain training necessary to uphold this strict standard are already in place. But perhaps even more importantly, the very precept that assures a free society dictates substantial protection from abuse of the power we must necessarily place in the hands of police officers.

A standard lower than probable cause for police searches would delete the concept of reasonableness so much as to emasculate the Fourth Amendment. Weeks v. U.S., 232 U.S. 383 at 344.

The status of school officials as

government officials subject to the proscriptions of the Fourth Amendment must not be misconstrued so as to make them analogous to police officers. School officials, as professional educators, receive none of the training in the legal technicalities of search and seizure that law enforcement officers must master. It is unreasonable to expect teachers and administrators to undertake such training. Although in some schools criminal activity may take place on a regular basis, investigation of crime is not the basic role of school officials. While a single administrator may be responsible for discipline in a school, that individual is nothing more than an experienced educator who has received administrative training. A concern for crime is simply not a part of the fabric of a teacher or administrator. To interject formal training in constitutional theory pertaining to police

searches would confound rather than enlighten school officials as to how to deal with actual incidents.

It is quite obvious that school officials and police officers serve very different functions in our society. The primary function of a school official is to educate within an environment conducive to learning. In recognition of this important role and in order to permit school officials to function freely and properly, the courts have consistently conferred upon them the special status of standing in loco parentis to students. State in Interest of G.C., 121 N.J. Super. 188; State v. Baccino, supra. Only by partially functioning in the role of a parent can school officials maintain the order necessary for a proper educational environment. N.J.S.A. 18A:37-1 to 5; N.J.S.A. 18A:38-31; N.J.S.A. 18A:26-2. Hence, too strict a standard of

reasonableness would serve to hinder a school official from carrying out his primary role of educating students. This is not to say that the constitutional rights of students can be lightly dismissed. A delicate balance between the competing interests of students and school officials must be struck ultimately. Clearly, in order to properly maintain the educational environment, individual freedoms must give way at some point to the well-being of the student body as a whole.

The "reasonable grounds" standard articulated by the New Jersey Supreme Court properly weighs the constitutional rights of students against the legislatively mandated responsibility of administrators to act in such a fashion as to maintain discipline and order within schools. While school officials cannot run roughshod over student's rights, there is no reason to prevent an official from conducting a

search for the safety of all students when there are reasonable grounds to do so.

Amicus is compelled to assert that while application of the exclusionary rule seems to logically flow from the application of the Fourth Amendment in the view of the New Jersey Supreme Court, the Court may have overlooked again the need to distinguish between the role of school officials and that of police officers.

The exclusionary rule was not designed to address the conduct of school officials acting with the good faith belief that illegal activity was in progress. The rule from its inception was designed to deter law enforcement officials from violating the constitutional rights of citizens in the administration of justice.

In sum the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than the personal constitutional rights of the aggrieved. United States v. Calandra, 414 U.S. 348.

Over 70 years ago this Court clearly identified deterrence as a major priority.

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which resulted in their embodiment in the fundamental law of the land. Weeks, supra, at 344.

The potential for over-zealous actions of police officers is thwarted by excluding illegally seized evidence at trial.

Excluding evidence obtained by a school official at trial clearly does not serve a similar purpose.

Application of the same logic to searches conducted by school officials does not result in the same deterrence. Police officers are charged with a higher level of awareness of the constitutional rights of individuals and the ramifications of violating such protections. It is, therefore, imperative to provide this

deterrent mechanism with respect to police conduct. The same rationale cannot be applied to school officials. The roles of police officers and school officials are totally dissimilar. Police officers are sworn to fight crime and protect the public from criminals. The role of a school official as it relates to crime is limited. A school official has little or no concern for ferreting out crime other than for the purpose of maintaining a safe environment for students. Police officers deal specifically with the Fourth Amendment rights of individuals much more frequently than school officials.

The primary concern of school officials in obtaining evidence of illegal conduct on the part of students is to protect the student body as a whole. It is submitted that school officials must be afforded a greater degree of flexibility than the police officer in conducting searches

necessary to protect the school environment. If school officials are held to the same standards as police officers, the orderly and safe environment necessary to providing students a thorough and efficient education may be in jeopardy.

Amicus suggests that a balance must be struck with respect to the conduct of school officials. The exclusionary rule is clearly applicable where it can be shown that it has a deterrent effect. In the school search context, deterrence is possible only where the search was conducted in bad faith. The exclusionary rule serves the purpose for which it was created when applied to searches conducted arbitrarily and in bad faith, and should deter school officials from engaging in constitutionally impermissible conduct in the future.

However, when a school official has a good faith belief that illegal activity is

present, application of the exclusionary rule will often frustrate the ultimate goal to preserve an orderly and safe environment for the student body. A deterrent effect on good faith searches conducted by school officials is clearly not desirable.

Applying the exclusionary rule to a good faith effort on the part of school officials would, in fact, have no deterrent effect. A school official would more than likely not be aware of the defect in the search and therefore exclusion of evidence obtained would not effect future conduct. Application of the rule, on the other hand, might have the ultimate deterrent effect whereby the school officials would be afraid to take any action no matter how reasonable. Neither of these results serves the purpose of the Fourth Amendment.

The Courts have long recognized the significance of a "good faith" belief on the part of government officials in

determining the admissibility of evidence seized under questionable circumstances. United States v. Pettier, 422 U.S. 531 (1975); United States v. Janis, 428 U.S. 433 (1976). In Janis this Court refused to apply the exclusionary rule to a federal civil tax proceeding where evidence was obtained through the execution of a defective warrant. The Court found that the government official had not acted in an illegal fashion and had relied on a good faith belief that the warrant was legally sound. A similar good faith belief on the part of government officials has served in the past to cure otherwise improper searches. In Wood v. Strickland, 450 U.S. 308 (1975) this Court addressed the issue of good faith on the part of an official as a defense in an action where a party claimed the official violated his rights under U.S.C.A. § 1983. The Court held that the defense of good faith immunity would be

defeated only if the official knew or should have reasonably known that the action he took within his sphere of responsibility would violated the rights of the plaintiff. The Court additionally pointed out that such a good faith defense would be unavailable if the government official "maliciously intended" to cause a deprivation of constitutional rights.

Amicus urges this Court to adopt the same rationale to searches conducted by school officials. Where school officials act in blatant disregard of the constitutional rights of students, this Court has no alternative other than to exclude any evidence obtained as a result of this misconduct.

A variation of the facts of T.L.O. can demonstrate the utility of the good faith standard. The facts in T.L.O. indicate that she vehemently denied smoking. The vice-principal thereafter, acting in good

faith in searching her purse, should not be subjected to the strict application of the exclusionary rule. If the facts of this case were changed to indicate that she freely admitted to smoking cigarettes any search thereafter must be deemed to have been conducted in bad faith. Such a bad faith action on the part of a school official would clearly dictate strict application of the exclusionary rule. In this situation the exclusionary rule would provide the deterrent effect for which it was designed.

In Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982) this Court again addressed the issue of imposing a good faith standard upon government officials as a prerequisite of granting them immunity for unintentional, unlawful conduct. The Court in Harlow reiterated:

Our decisions consistently have held that government officials are entitled to some form of immunity

from suits for damages. As recognized at common law, public officers require this protection to shield them from undue interference with their duties and from potentially disabling acts of liability. Harlow, supra, at 2732.

The Court in Harlow recognized the need to provide flexibility for government officials and dealt with the potentially disabling threat of liability being imposed by allowing for a good faith defense. It is clear, however, if the actions taken by the official are blatantly in bad faith, this defense will not be available and the official is exposed to any liability naturally resultant from his actions. The same rationale the Court has utilized to protect government officials from liability should be applied to school officials conducting searches. If school officials must operate under the strict application of the exclusionary rule, they will be substantially disabled in their efforts to execute their duties as educators and to

protect the safety and well-being of students. It can hardly be argued that a school official would be unreasonable to search a locker where there is a substantial likelihood that a bomb is present and a good deal of evidence supports that belief. Given these facts the resultant search would certainly be in good faith. This Court must recognize the necessity of providing school officials with this defense, however, or school officials will be paralyzed by the application of rule that simply was not designed to address the good faith conduct of school officials. If school officials cannot rely on their concept of the term "reasonable", they will lose control of the schools and the student body. Some measure of flexibility must be provided to avoid the result.

Amicus respectfully submits that a good faith standard can be effectively imposed

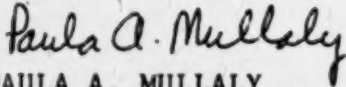
upon school officials in their efforts to operate schools in an orderly and safe fashion. The purpose and spirit of the exclusionary rule and the integrity of the Fourth Amendment remain intact by providing school officials with the flexibility they must have in order to operate schools and provide a thorough and efficient education for children. Allowing this good faith exception to the exclusionary rule as it relates to school officials in no way results in a diminution of the deterrent purpose for which it was created.

CONCLUSION

The New Jersey School Boards Association, in keeping with its adopted policy and consistent with its by-laws, implores this Court to recognize the necessity of providing school officials with a mechanism to control the operation of the public schools. It is respectfully submitted that the exclusionary rule should

not be applied where school officials have acted in good faith, for the reasons and arguments set forth above.

Respectfully submitted,



PAULA A. MULLALY
Counsel of Record

General Counsel
New Jersey School
Boards Association
315 West State Street
P.O. Box 909
Trenton, New Jersey 08605
(609) 695-7600

THOMAS F. SCULLY
Assistant Counsel
New Jersey School
Boards Association

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

THE STATE OF NEW JERSEY,
Petitioner,
v.

T.L.O., A JUVENILE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE A BRIEF
AMICUS CURIAE OF THE
WASHINGTON LEGAL FOUNDATION
AND BRIEF OF *AMICUS CURIAE*,
THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
Counsel of Record
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

Attorneys for Amicus Curiae
Washington Legal Foundation

January 12, 1984

QUESTION PRESENTED

Whether the exclusionary rule, a procedural safeguard rather than a constitutional right, fashioned by this Court primarily to deter the conduct of law enforcement officers violating Fourth Amendment rights, should be applied to a search of a student's purse during regular school hours by a public school administrator.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-712

THE STATE OF NEW JERSEY,
Petitioner,
v.

T.L.O., A JUVENILE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

**MOTION OF THE WASHINGTON LEGAL FOUNDATION
TO FILE A BRIEF *AMICUS CURIAE***

The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Rules 42 and 36 of the Supreme Court Rules for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Counsel for both Petitioner and Respondent have neither consented nor opposed the filing of this brief. Petitioner tentatively consented by telephone conversation but written consent had not been received by movant by the time this brief was sent to the printers. Citing insufficient time, Respondent declined to consent to movant's participation as *amicus curiae*.

The Washington Legal Foundation is a non-profit, public interest law firm organized and existing under the

laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. The Foundation has more than 85,000 members and 120,000 supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation has recently inaugurated a "Drug Alert" Project designed to encourage and support efforts to curb the alarming increase of illegal drug use especially by this country's youth. Among other activities, WLF provides legal assistance, guidance and educational materials to parent-teacher groups, drug rehabilitation centers and municipalities interested in curbing drug abuse which leads to wasted and destroyed lives. WLF participates in court cases which implicate the proper administration of justice in this area.

The Foundation has been allowed to appear before this Court as *amicus curiae* in many cases dealing with criminal justice issues. See, e.g., *Barefoot v. Estelle*, — U.S. —, 51 U.S.L.W. 5189 (July 6, 1983); *United States v. Ptasynski*, 51 U.S.L.W. 4674 (June 6, 1983); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). More specifically, WLF joined 25 State Attorneys General and appeared before this Court in *Illinois v. Gates*, 51 U.S.L.W. 4708 (June 8, 1983) arguing for a good faith exception to the exclusionary rule.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the general public by urging the Court to reverse the decision of the Supreme Court of New Jersey in *State in the interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983). The New Jersey Supreme Court's ruling applies the exclusionary rule as fashioned by this Court in *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 252

U.S. 393 (1914), to a search of a student conducted by a public school administrator during regular school hours. In so doing, the lower court ignores the narrow and prudent limitations this Court has placed on the rule through its prior decisions and impermissibly broadens the judicially created procedural safeguard in such a way as to harm the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented by the parties in interest which will assist this Court in obtaining full consideration of the public interest issues involved. Accordingly, the Foundation respectfully requests permission to file the annexed brief *amicus curiae*.

Respectfully submitted,

DANIEL J. POPEO

PAUL D. KAMENAR

Counsel of Record

WASHINGTON LEGAL FOUNDATION

1705 N Street, N.W.

Washington, D.C. 20036

(202) 857-0240

Attorneys for Amicus Curiae

Washington Legal Foundation

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Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

**BRIEF OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION**

**INTEREST OF AMICUS CURIAE
THE WASHINGTON LEGAL FOUNDATION**

The interests of the Washington Legal Foundation in this case are set forth in the foregoing motion for leave to file a brief *amicus curiae*.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the statement of the case provided in Petitioner's brief.

SUMMARY OF ARGUMENT

The Supreme Court of New Jersey erroneously extended the application of the exclusionary rule, a procedural safeguard fashioned by this Court, *Mapp v. Ohio*,

367 U.S. 643 (1961); *Weeks v. United States*, 252 U.S. 383 (1914), to searches of students conducted by public school officials during regular school hours. The rule's application in this context is beyond the scope of the rule's remedial objectives, i.e., deterring police conduct, and harmful to the public interest in maintaining a drug-free learning environment in this nation's public schools.

ARGUMENT

I. THE APPLICATION OF THE EXCLUSIONARY RULE TO A SEARCH CONDUCTED BY A PUBLIC SCHOOL ADMINISTRATOR IS BEYOND THE SCOPE OF THE RULE'S REMEDIAL OBJECTIVES AND HARMFUL TO THE PUBLIC INTEREST.

In the landmark case of *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court applied to the states a rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment principally upon the belief that the exclusion would deter future unlawful police conduct. In more recent decisions, this Court has reiterated that the primary justification for the exclusionary rule is the deterrence of conduct by law enforcement officers that violates a Fourth Amendment right. *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). In these decisions, this Court has taken pains to point out that the rule is not a constitutional right, but rather a "remedial device", the application of which must be restricted to those areas where its objective, i.e., deterring the unconstitutional activity of law enforcement officers, is most efficaciously served.

To paraphrase a seminal article quoted favorably by this Court in *Stone v. Powell*, *amicus curiae* submits that granted, while so many criminals must go free in order to deter the constables from blundering, the pursuance of this policy beyond necessity inflicts gratuitous harm on

society. 428 U.S. at 487 (quoting Amsterdam, *Search, Seizure and Section 2225: A Comment*, 112 U. Pa. L. Rev. 378, 388-389 (1964)). The Supreme Court of New Jersey, by applying the rule to searches by public school administrators, recklessly ignored this Court's narrow application of the rule and harmed the public interest in maintaining a drug-free learning environment in our public schools.

A. The Application of the Rule Should be Narrowly Restricted to the Illegal Activity of Law Enforcement Officers.

This Court has stated and emphasized that the principal, if not sole, justification for the exclusionary rule is the deterrence of *police conduct* that violates a Fourth Amendment right. 428 U.S. at 486. In the historic *Mapp* decision, this Court characterized the rule as a "deterrent safeguard" against unlawful seizures by *law enforcement officers*. 367 U.S. at 648. Since *Mapp*, this Court has applied the rule exclusively to searches conducted by law enforcement officers.

In the instant case, the New Jersey Supreme Court has extended the rule to allow the criminal to go free "because the teacher has blundered." Yet this Court has never ruled that the Constitution demands the exclusion of evidence acquired through a search by a public school administrator completely devoid of any police involvement. The rule was designed to be applied to and designed to deter activity like the warrantless search by police officers in the *Mapp* case. Refusing to tolerate these "shortcut methods in law enforcement" was the motive of this Court in fashioning the rule. This Court saw the application of the rule in this context as correct not only because of the constitutional imperative but because the rule made good sense. 367 U.S. at 657.

The application of the exclusionary rule to school administrators, however, makes little sense whatsoever.

Public school officials have no connection with law enforcement. Their objectives are not to arrest and bring to trial persons who have broken the law, but to enforce school rules and regulations to promote a healthy and safe environment of learning. The objective of the assistant vice-principal in the present case was not to secure an arrest, but to enforce the school rules regulating cigarette smoking. By necessity, this interest in fostering a healthy educational environment sometimes entails regulating activity that is criminal in nature, *e.g.*, vandalism, assaults on teachers and students and the like. Be that as it may, it was never the intent of this Court to apply the exclusionary rule to persons other than law enforcement officers, and this Court should reject Respondent's suggestion to do so.

In his famous dissent, Chief Justice Burger in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), stated:

Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. . . . I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition.

Id. at 419. The Supreme Court of New Jersey let a "tiger loose in the schoolroom" by inflicting "capital punishment" on the courtroom use of illegal drugs found by a school administrator. *Amicus* contends that society has the right to expect that the exclusionary rule, a deadly procedural bar to the conviction of admittedly guilty individuals, will be *narrowly* tailored by the courts to apply only when the *Mapp* goals, are furthered, *i.e.*, deterring dishonest and unconstitutional methods of law enforcement.

B. The Potential Benefit of Applying the Rule to School Searches is Outweighed by the Potential Harm to the Public Schools and the Public Interest.

In *Stone v. Powell*, this Court emphasized that the policies behind the exclusionary rule are not absolute, but must instead be evaluated in light of competing policies. 428 U.S. at 488. Courts should employ a pragmatic analysis of the exclusionary rule's usefulness in a particular context and ask whether the benefits of applying the rule outweigh the costs society must bear by requiring the evidence to be excluded.

Therefore, the issue in the instant case is not whether students are entitled to the minimum protections of the Constitution or whether the Fourteenth Amendment as now applied to the states protects students against unconstitutional actions by public school administrators.¹ Rather, the issue is whether the potential benefits of extending the application of the exclusionary rule to regulatory conduct by public school administrators outweigh the potential injury to the role and functions of public school administrators and society in general.

In *Stone*, this Court examined the issue of whether state prisoners may invoke an exclusionary rule claim after fair and final consideration of the claim at the state level on Federal habeas corpus review. This Court declined to apply the rule in this instance since it believed that law enforcement officers would not be deterred from committing Fourth Amendment violations out of fear that Federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.

¹ Respondent's reliance on *Tinker v. Des Moines, etc. School District*, 393 U.S. 503 (1969), is misplaced in the present context. *Amicus* acknowledges that students are "persons" under our Constitution and are possessed of fundamental rights which the state must respect. *Id.* at 509. This is not the issue in the present case. The issue is whether, using a pragmatic analysis, the application of the exclusionary rule to school searches is useful.

Id. at 493. Any incremental deterrent effect that would be produced by allowing this kind of collateral review would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice. *Id.* at 494.

Similarly, the same practice of limiting the application of the rule in situations where the costs to society far outweigh any incremental deterrent effect produced by the application of the rule can be found in this Court's standing cases. For example, in *Rakas v. Illinois*, 439 U.S. 128, 134 (1978), this Court refused to apply the exclusionary rule to the benefit of defendants whose Fourth Amendment rights had not been violated. See also *United States v. Payner*, 447 U.S. 727, 735 (1980), in which the majority of this Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before this Court. This Court emphasized that the interest of deterring illegal searches would not be served by exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." *Id.*

In a similar vein, this Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In *United States v. Havens*, 446 U.S. 620, 628 (1980), this Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and this Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. See also *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); and *Walder v. United States*, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in Federal civil proceedings even though the evidence was seized in violation of the Constitution. In *United States v. Janis*, 428 U.S. 433, 455, Justice Blackmun wrote that

there was no justification for extending the exclusionary rule to a Federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

Similarly, the rule has not been applied to grand jury proceedings. *United States v. Calandra*, 414 U.S. 338. The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. *Id.* at 352.

In the instant case, the potential costs to society's interest in maintaining a safe and intellectually stimulating public school system are obvious and great. The primary concern of public school administrators is, not surprisingly, the education of America's youth and the enforcement of school rules to see that this education can take place in a proper and conducive environment. The public school is not an arm of the criminal justice system and should be allowed to pursue its educative functions without being strapped by the innumerable procedural restrictions of a police investigation or a criminal trial.² This Court has consistently reinforced this view by emphasizing in a number of cases that judicial interposition in the operation of the public school system of this country requires particular care and restraint. See *Board of Curators of the University of Missouri v. Horo-*

² This is buttressed in New Jersey by statutes giving school administrators broad authority to maintain order, safety and discipline. N.J. STAT. ANN. Section 18A-25-2 (West 1968).

witz, 435 U.S. 78 (1978); *Ingraham v. Wright*, 430 U.S. 651 (1977).

Recent statistics on the scope of the drug and alcohol problem in the public schools provide grim evidence of the problems of drug abuse school administrators face today. *Weekly Reader*, a children's magazine distributed in the public schools, surveyed over 500,000 children in 1980 on drug and alcohol use among their peers. About one-third of the students in grades 4-8 believed that drinking alcohol is "A big problem" among children their own age, and about 40 per cent said the same about drugs. In both cases the percentages rose among high school students. WEEKLY READER PERIODICALS, A STUDY OF CHILDREN'S ATTITUDES AND PERCEPTIONS ABOUT DRUGS AND ALCOHOL (1980).

The National Institution on Drug Abuse's 1982 survey on student drug use, the sixth in an annual series reporting the drug use and related attitudes of high school seniors in the United States, reports that roughly two-thirds of all American young people (64%) try an illicit drug before they finish high school. Over one-third have illicitly used drugs other than marijuana. At least one in every sixteen high school seniors is actively smoking marijuana on a daily basis, and 20% have done so for at least a month at some time in their lives. About one in sixteen is drinking alcohol daily; and 41% have had five or more drinks in a row at least once in the past two weeks. Much of the activity takes place during school hours and on school premises. These alarming statistics reflect the highest levels of illicit drug use to be found in any nation in the industrialized world. L. JOHNSTON, J. BACHMAN, P. O'MALLEY, National Institute on Drug Abuse's STUDENT DRUG ABUSE ATTITUDES AND BELIEFS 14 (1982).

A report by the New Jersey Department of Education stated that between July 1, 1979 and June 30, 1981, New Jersey districts reported 21,721 incidents of violence;

vandalism, drug abuse, or some combination of the three. NEW JERSEY DEPARTMENT OF EDUCATION, FINAL REPORT ON THE STATEWIDE ASSESSMENT OF INCIDENTS OF VIOLENCE, VANDALISM AND DRUG ABUSE IN THE PUBLIC SCHOOLS 2, 4, 5 (July, 1982). The report went on to urge local school boards to:

actively assist students and staff by assuring a safe atmosphere, free from danger and disruption and one which promotes a positive environment conducive to learning. Disruptive behavior constrains the learning process and lowers school morale at all levels. A discipline policy must hold students accountable and consequently apply remedial and preventive steps that will ensure the safety and promote the education of all pupils.

Id. at 59. This discipline policy, vital towards ensuring that students have a right to pursue their academic endeavors without exposure to dangers or overwhelming distraction, requires that school administrators have broad supervisory powers. Excluding drugs, weapons, and other incriminating evidence at a juvenile's delinquency hearing because the juvenile's teacher or vice-principal did not comply with the meticulous and ever-changing requirements of the Fourth Amendment as pronounced by appellate judges can only undermine that discipline policy needed more than ever in today's schools to ensure a healthy learning environment.

In contrast to the overwhelming and blatant costs that are potentially lurking as a result of the New Jersey Supreme Court's opinion, any incremental deterrent effect which might be achieved by extending the rule to apply to school administrators is uncertain at best. There is already considerable opinion that little deterrence of police misconduct results from the exclusion of illegally seized evidence from criminal trials.³ It is even less

³ Chief Justice Burger, in his dissenting opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,

plausible that any deterrence of misconduct by school administrators will result from the exclusion of illegally seized evidence at a juvenile's criminal proceeding.

The Chief Justice has acknowledged that policemen do not have the time, inclination, or training to grasp the nuances of the appellate opinions that ultimately define the procedural standards of conduct they are to follow in investigating a crime, *Bivens*, 403 U.S. at 447.⁴ *Amicus* asks how possibly can teachers and school administrators, concerned primarily with the education of the Nation's youth and not with law enforcement acquire and maintain working knowledge of search and seizure procedure. School officials have little knowledge or interest in criminal proceedings and are likely not to comprehend why evidence seized by them in the course of their administrative duties is later suppressed at a juvenile criminal proceeding.

The fact that the application of the rule in this context will have little or no deterrent effect on the actions of school administrators is reinforced by the remoteness of the seizure and the criminal proceeding. School administrators are not only insulated from the actual exclusion

403 U.S. 388, stated flatly that "... there is no empirical evidence to support the claim that the rule deters illegal conduct of police officers." *Id.* at 416. There is, however, some empirical evidence of non-deterrence of police "misconduct" by the exclusionary rule; see: Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 Journal of Legal Studies 243 (1973); see, generally: Wilkey (Malcolm R., Judge, United States Court of Appeals for the District of Columbia Circuit), *The Exclusionary Rule: Should the Criminal Go Free Because the Constable Has Blundered?* 62 Judicature, 5, 215 (November 1978). Judge Wilkey also points out that no other nation in the free world has engrafted the exclusionary rule onto its criminal justice system; *id.* at 216.

⁴ Illustrated recently in *Robbins v. California*, 453 U.S. 420 (1981) where a total of 14 judges reviewed a search, 7 finding it invalid and 7 finding it valid.

decision (as are police officers) but also from the entire criminal proceeding. The purpose of deterrence is defeated because the school administrator may never even learn the outcome of the proceeding.

Finally, criminal prosecution is wholly unrelated to the duties of a public school administrator. He or she is mainly concerned with enforcing the school rules to ensure the safety of the students and maintain a healthy educative environment. The assistant vice-principal that discovered the drugs in the purse of Respondent arguably would not have been deterred by the exclusion of the evidence in the later criminal proceeding, since his main goal in implementing the search was the enforcement of the school's no-smoking regulation. Endorsing the Supreme Court of New Jersey's reckless extension of the exclusionary rule would merely confuse school administrators and ultimately disrupt disciplinary measures needed to maintain a proper learning environment.

CONCLUSION

For all of the reasons stated above, the Washington Legal Foundation submits that the ruling of the court below must be reversed.

Respectfully submitted,

DANIEL J. POPEO
 PAUL D. KAMENAR
 Counsel of Record
 WASHINGTON LEGAL FOUNDATION *
 1705 N Street, N.W.
 Washington, D.C. 20036
 (202) 857-0240

*Attorneys for Amicus Curiae
 Washington Legal Foundation*

January 12, 1984

* *Amicus* wishes to express its appreciation to Daniel J. Kelly, law clerk, for his valuable assistance in the preparation of this brief.

No. 83-712-CSY
Status: GRANTED

Title: New Jersey, Petitioner
v.
T.L.O.

Docketed:
October 7, 1983

Court: Supreme Court of New Jersey

Counsel for petitioner: Nides, Allan J.

Counsel for respondent: De Julio, Lois A.

Entry	Date	Note	Proceedings and Orders
1	Oct 7 1983	G	Petition for writ of certiorari filed.
2	Nov 7 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Nov 7 1983		Brief of respondent T.L.O. in opposition filed.
4	Nov 9 1983		DISTRIBUTED. November 23, 1983
5	Nov 28 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Nov 28 1983		Petition GRANTED. *****
8	Jan 9 1984		Order extending time to file brief of petitioner on the merits until January 17, 1984.
9	Jan 12 1984	G	Motion of National School Boards Association for leave to file a brief as amicus curiae filed.
10	Jan 12 1984	G	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
11	Jan 12 1984	G	Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae filed.
12	Jan 16 1984		Brief of petitioner New Jersey filed.
13	Jan 16 1984		Joint appendix filed.
14	Jan 23 1984		Motion of National School Boards Association for leave to file a brief as amicus curiae GRANTED.
15	Jan 23 1984		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
16	Jan 23 1984		Motion of New Jersey School Boards Association for leave to file a brief as amicus curiae GRANTED.
17	Jan 30 1983		Leave to file respondent's brief on the merits in excess of the page limits filed with WJB (A-611).
18	Jan 30 1984		Record filed.
19	Jan 31 1984		Order granting leave to file respondent's brief on the merits not to exceed 65 pages by Justice Brennan.
21	Feb 9 1984		Brief of respondent T.L.O. filed.
22	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 28, 1984. (3rd case)
23	Feb 16 1984		Brief amicus curiae of ACLU, et al. filed.
24	Feb 27 1984		CIRCULATED.
25	Mar 21 1984	X	Reply brief of petitioner New Jersey filed.
26	Mar 28 1984		ARGUED.